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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 548

MEYER GORDON,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No.

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices:

Meyer Gordon, petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered December 5, 1949, in this cause, that Court's number 10, 850 (Tr. 332), which affirmed a judgment of the District Court of the United States for the Eastern District of Michigan (Tr. 342) denying the petitioner's Motion for a New Trial on the basis of newly discovered evidence, and denying the petitioner's Motion for an order vacating the judgment (Tr. 304).

The petitioner also prays for a writ of certiorari to review the action of the United States Court of Appeals

for the Sixth Circuit in denying the petitioner's Motion filed in that court to remand the case to the District Court for reconsideration of his Motion for a New Trial, which motion was based upon new and additional evidence discovered after the original hearing in the United States District Court.

The opinion of the Court of Appeals appears in the record herein (Tr. 333-343) and is not yet reported. No opinion was rendered on the Petitioner's Motion to Remand. The court's order denying said motion, however, was entered Jan. 3, 1950 (Tr. 344-45).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED. [1]

Petitioner, who is now incarcerated in a Federal penitentiary in consequence of two consecutive sentences of 10 years each imposed upon him in 1946 by the District Court for the Eastern District of Michigan for alleged violations of the National Stolen Property Act (U.S.C.A., Title 18, Sections 415 and 418A), filed in that Court in 1948 the instant Motion for a New Trial upon the ground, fully discussed in the Brief in Support of this Petition, that one Herman Frank Banning, the principal witness upon whose testimony petitioner was convicted has repeatedly recanted his testimony, that there now exists affirmative and undisputed proof that Banning perjured himself with the knowledge of Government officials as to matters vital to the petitioner's conviction and that petitioner can now produce four witnesses, each of whom was unavailable to him at the time of his trial either because the witness was absent from

[1] A concise but full narration of the facts appears in the *Statement of the Case in the Brief in Support of this Petition*, post, (pp. 15 to 27). The instant statement is confined to a very terse indication of the nature of the case and of the questions presented.

the jurisdiction or had a privilege against self-incrimination, whose testimony will exonerate petitioner. The affidavits of Banning and four other witnesses were appended to petitioner's motion.

The District Court denied petitioner's motion. The Court, however, explicitly stated:

> (1) "I think that the Government's case must rest or fall on Banning, all of it."
>
> (2) "If that testimony" [Banning's testimony implicating petitioner and now recanted] "hadn't been here, Gordon could never have been convicted. I don't think I would even let it go to the jury because if he had not seen the man, there was no connection of Gordon with this case, except that incident in the hotel." (Tr. 204.)
>
> (3) That the newly discovered evidence was of such a character that "**There couldn't be a jury in the world found now to believe Banning, and anybody that knows anything about trials knows that. Nobody would believe Banning now, no jury would** . . . So if I let Mr. Meyer Gordon out, I let him out. If there is a new trial, there isn't a chance of [his] ever being convicted." (Tr. 231.)
>
> (4) That "**I didn't necessarily believe Banning . . . I have never at any time said I believed Banning, have I, at any place?**" (Tr. 226.)

Thus the Trial Judge explicitly found (1) that Banning's testimony was essential to petitioner's conviction, (2) that no jury would now convict petitioner, and (3) that the Trial Judge himself "did not necessarily believe Banning".

Nothwithstanding these explicit findings in favor of petitioner, the District Judge denied the Motion for a New Trial.

While petitioner's motion was under the Trial Judge's advisement, the Judge, without the knowledge, much less the consent of counsel for either petitioner or the Govern-

ment, made a personal trip to the penitentiary at Columbus, Ohio, there privately interviewed one Sidran, one of the witnesses who is now willing to testify in exoneration of the petitioner, obtained Sidran's confirmation of his affidavit exculpating petitioner, then, likewise without the knowledge or consent of counsel for petitioner or the Government, privately consulted with FBI officials as to the truth of Sidran's exoneration of petitioner and reflected in the record his conclusions based upon these extrajudicial conferences and interviews by stating, "There goes Sidran's affidavit," (Tr. 223).

Although the Trial Judge was willing thus to interview Sidran and FBI officials privately and without the knowledge of counsel in the case, he refused to hear in open court the testimony of any of the witnesses tendered by petitioner as now willing to exonerate him.

The Court of Appeals, overruling petitioner's contention that the Trial Judge's findings entitled him to a new trial and that in any event the Trial Judge's extrajudicial interviews of Sidran and FBI agents entitled petitioner to a reversal of the order denying the Motion for New Trial, has affirmed the denial of a new trial in this case.

The evidence of Banning's perjury with respect to his motivation in testifying against petitioner, set forth in full substance in *Brief in Support of this Petition, post,* and merely indicated here, was that although Banning swore that he had no ulterior reason for implicating petitioner, shortly after petitioner's conviction Banning received the following rewards: (1) the procurement of a pardon from a 20 year sentence he was then serving, (2) dismissal of another indictment for robbery pending against Banning at Cleveland, (3) permission to go at large upon his own recognizance despite his plea of guilty to the

crime for which petitioner was convicted, (4) the procurement of a job for him by Government officials, and (5) as disclosed by appellant's Motion to Remand, discussed *post*, the procurement of the dismissal of a State information for robbery pending against Banning at Omaha upon the representation that he had been "useful" to the Government in convicting appellant. Sundry lesser favors were also bestowed upon him while he was awaiting Gordon's trial. (See *Brief in Support of this Petition, post.*)

Thus there is now no doubt that Banning lied in denying on petitioner's trial that he expected reward for the testimony on which, as both the Trial Court and the Court of Appeals have declared, petitioner's conviction rests. Nor can the Government be supposed to have been without knowledge that his disclaimer of hope of reward was false, particularly in view of the fact that it is undenied that the FBI agent in charge of the case prior to trial made a bet with Banning that Banning would be out if petitioner was convicted. (See opinion of Court of Appeals (Tr. 336-37).) This was not denied.

Banning also disclosed that twice before the trial and while he was at Leavenworth two F.B.I. agents visited him, told him that they were trying to get evidence against Gordon, that if he would cooperate he and his wife would not be indicted at Fort Wayne on a robbery charge, and that nothing would happen to his wife and "it would do me a lot of good." This, likewise was not denied. (Tr. 185.)

Petitioner also presented to the Court of Appeals a Motion for Remand in the light of still more recent discoveries of rewards granted to Banning for his testimony against petitioner. This evidence, discovered while peti-

tioner's present appeal was pending in the Circuit Court of Appeals, disclosed that an additional reward for his testimony convicting petitioner had been granted to Banning when the United States Attorney at Detroit had requested the County Attorney at Omaha, Nebraska, to dismiss another indictment for robbery pending there against Banning, and procured such dismissal upon the representation that Banning had been "useful" to the Government in convicting the petitioner. Government affidavits disclosed this to be true, despite the fact that the Government officials, upon demand, refused to disclose the correspondence leading up to this dismissal. The Court of Appeals, however, without opinion, denied the petitioner's motion for remand, although the evidence had never been available to the lower court, since it was not discovered until after the case was pending on appeal.

Jurisdiction.

This Court has jurisdiction under Section 1254(a) of Title 28, enacted June 25, 1948, and by virtue of alleged violations of the United States Constitution, and under Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

The Questions Presented.

The questions presented are:

I.

The Trial Court made explicit findings (1) that Banning's testimony was essential to petitioner's conviction, (2) that no jury would now believe Banning or convict petitioner, and (3) that the Trial Judge "did not necessarily believe Banning." Nevertheless the Trial Judge refused a new trial.

Did these findings entitle petitioner to a new trial under the applicable rules governing new trials on the ground of newly discovered evidence? [Cf. *Griffin* v. *United States*, 336 U. S. 704, discussed *post*.]

II.

Did the Trial Judge's conduct in secretly interviewing Sidran and FBI agents constitute such a departure from the norms of due process and fair hearing as to entitle petitioner to a reversal of the order denying his Motion for a New Trial?

> [Cf. *Williams* v. *New York*, 337 U. S. 241, where this Court, speaking specifically of extra-judicial matter not comprising a part of the record, said, "Tribunals passing on the guilt of a defendant have always been hedged in by strict evidentiary procedural limitations," and *People* v. *Cooper*, 398 Ill. 468, declaring that "Any private investigation by a Court pending a Motion for a New Trial constitutes a denial to the defendant of the constitutional guarantee of due process of law." And that this is so regardless of the result of such an investigation.]

III.

Did the refusal of the District Court to hear in open court the witnesses now available to the petitioner, coupled with the Trial Judge's willingness to interview Sidran and the FBI agents secretly, constitute such a denial of petitioner's rights, constitutional or implicit in the ordinary canons of judicature in Federal criminal cases, as to entitle petitioner to a reversal?

IV.

On petitioner's trial the Government sat by while Banning testified that he had no ulterior motive for testifying against petitioner. On that trial the Government argued that "Banning has been promised nothing" (Tr. 39-39) and that he "faces twenty years" in this case and another "10 years at Cleveland." Shortly after petitioner's conviction, Banning received the *largesse* indicated in the *Summary and Short Statement of the Matter involved, ante.* The Trial Court on the motion for a new trial found that in fact Banning had hope of reward when he testified, notwithstanding the Government's protestations to the contrary on petitioner's trial. The Court stated he was "not naive enough to believe" that Banning expected no reward for convicting petitioner by his testimony. (Tr. 235-36).

Did the Government's conduct in arguing that Banning was a disinterested witness when it is now apparent that the Government must have known that he was not such, violate those principles of fairness enjoined upon courts and prosecutors by the Constitution or this Court's principles of criminal jurisprudence? (See *McNabb* v. *U. S.*, 318 U. S. 332.)

V.

Did the action of the Circuit Court of Appeals in summarily deciding, without opinion, not to remand the case to the District Court for a reconsideration of petitioner's motion constitute reversible error when the motion to remand disclosed that Banning had been given another reward for his testimony implicating petitioner in that, after petitioner's conviction, the United States Attorney

had requesed the dismissal of a State information for robbery pending against Banning at Omaha, and had represented that Banning had been "useful" to the Government in convicting petitioner? This evidence had not been available or considered by the Trial Court in the original hearing. It had been suppresed by the Government's refusal to produce its correspondence.

VI.

Is a motion for a new trial based upon newly discovered evidence partially consisting of recantations a matter *solely* for the discretion of the Trial Court, as indicated in the opinion of the Court of Appeals, or is the criterion for adjudication whether a jury would reasonably be expected to acquit in the light of the new evidence, as held in the 3rd and 9th Circuits (cf. *U. S.* v. *Ward*, 168 F. (2d) 226, (CCA 3); *Cleary* v. *U. S.*, 163 F. (2d) 748, (CCA 9). See also *Griffin* v. *U. S.*, 336 U. S. 704 and *Helwig* v. *U. S.*, 162 F. (2d) 837 (CCA 6).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Reasons Grounded Upon the Trial Court's Finding That "No Jury Would Now Believe Banning" and That the Trial Judge "Did Not Believe Him", Both the Trial Court and the Court of Appeals Having Declared That Credence in Banning's Testimony Was Essential To a Conviction.

This case raises questions of importance throughout the Nation concerning the proper canons of judicature on motions for new trial on the ground of newly discovered evidence in criminal cases.

Both the Trial Court and the Court of Appeals have declared that credence in Banning's testimony is essential to a conviction of petitioner. The record presents the Trial Court's explicit findings that no jury would now believe Banning and that the Trial Judge "did not necessarily believe him".

The Trial Judge has a very wide measure of discretion when the matter is one of believing or not believing a witness or conceiving what a jury would or would not do with newly discovered evidence (*U. S.* v. *Johnson,* 327 U. S. 106). But in this case the Trial Judge declared positively that no jury would now convict petitioner and that he himself did not "necessarily believe Banning". (Tr. 226.)

We read *Griffin* v. *United States,* 336 U. S. 704, as teaching that where a Trial Judge concludes that a *jury* would acquit in light of newly discovered evidence, it is his duty to grant a new trial regardless of his own belief as to the guilt or innocence of the defendant. If we are correct in thus understanding the *Griffin* case, the Court of Appeals'

decision is so clearly in conflict with this Court's applicable holding in that case as to call for the exercise of this Court's power of supervision.

But if the *Griffin* case leaves it doubtful whether the judicial criterion on a motion for new trial is the Trial Court's view of what a jury would do or is his own belief as to a defendants' guilt or innocence notwithstanding the new evidence, then the question is an important one that has not been but should be settled by this Court.

In the *Brief in Support of This Petition, post,* it is shown that there is a diversity of opinion among Courts of Appeals and other Courts of high authority as to whether the question upon a motion for new trial on the ground of newly discovered evidence is,

> Does the *Trial Judge himself* believe the newly discovered evidence.

or whether the question is

> Does the Trial Judge believe that a *jury* would probably believe it?

This problem is basic in criminal jurisprudence. If it has not been settled clearly in petitioner's favor by the *Griffin* case, it should elicit this Court's writ of *certiorari.*

Reasons Grounded Upon the Trial Court's Secret Interview of a Material Witness and His Subsequent Consultation of FBI Agents.

Another very important question is raised by the Trial Court's private interview of witnesses without the knowledge or consent of counsel for either side. The Court of Appeals for the Sixth Circuit finds no denial of due process in this action on the part of the Trial Court. The Supreme

Court of Illinois, however, has flatly declared in *People* v. *Cooper*, 398 Ill. 468, 472:

> "In short, *any* private investigation by a court pending a motion for a new trial constitutes a denial to the defendant of the constitutional guarantee of due process of law."

In *People* v. *McGeoghegan*, 325 Ill. 337, the Supreme Court of Illinois reversed a denial of a motion for a new trial where the Trial Judge sent his bailiff to interview a material witness *although the bailiff's report of the interview was favorable to the accused.* The Court held that such extra-judicial interviews in connection with motions for new trial in criminal cases deny *per se* basic rights.

There is thus a substantial conflict between the holding of the Court of Appeals in the instant case, which undertakes to search the mind of the Trial Judge and finds that it was not infected by these extra-judicial interviews, and the decision of the Supreme Court of Illinois holding categorically and peremptorily that the mere conduct of such an interview, regardless of its outcome or result, denies due process *per se.*

Petitioner therefore submits that this case propounds important questions of constitutional law and criminal jurisprudence in Federal Courts which ought to be decided by this Court, and presents a conflict between the *rationale* of the Court of Appeals' opinion in the instant case and the declaration of the Supreme Court of Illinois that extra-judicial investigations such as that involved in this case automatically deny due process.

Wholly apart from any conflict in the declarations of lower courts, the practice of secret interviews by a Trial Judge of material witnesses is, we think, a clear denial of due process of law. But if such a revolutionary technique

of judicial investigation is licit, it should have the explicit approbation of this Court.

Reasons Grounded Upon the Contention that the Government's Conduct in this Case, as Disclosed by the Present Newly Discovered Evidence, Violated the Fundamental Canons of Fair Play.

The Government's conduct in permitting Banning to disclaim ulterior motives for implicating petitioner and the prosecutor's conduct in arguing to the jury that Banning was "facing another 20 years by his plea of guilty in the instant case and another 10 years at Cleveland" (Tr. 38-39) when, as is now apparent, Banning had the most tangible hope of the complete amnesty which he so shortly received was, we submit, such as to raise the substantial question, stated as Question IV, *supra,* as to whether the Government has transgressed the fundamental rules of fairness required in the administration of criminal justice.

Reasons Grounded Upon the Court of Appeals' Refusal to Remand Upon the Suggestion in that Court of Still More Recently Discovered Evidence.

The Court of Appeals' denial without opinion of the petitioner's motion in that Court for remand on the ground of still further rewards to Banning, summarized *ante,* raises an important question as to the function of the Court of Appeals in the administration of Federal criminal jurisprudence in cases such as this one.

Reasons Grounded Upon the Total Complex of Facts of Question of Denial of Due Process or the Serious Departure From the Principles of Criminal Jurisprudence.

Petitioner respectfully submits the Trial Court's denial of his motion, when viewed in the light of the totality of the facts in this record and with particular regard to the Court's willingness to interview a witness secretly, but his unwillingness to have any of petitioner's witnesses called before either the court or a jury, raises questions of sufficient importance to evoke certiorari.

PRAYER FOR GRANTING THE CERTIORARI.

Wherefore, petitioner respectfully prays this Court's Writ of Certiorari to review and reverse the judgment of the Court of Appeals for the Sixth Circuit in this case.

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BRIEF IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

The *Summary and Short Statement of the Matter Involved, ante,* is a brief indication of the nature of the case, of the questions emerging from the record, and of their importance—This Statement sets forth the full substance of the matters relied upon for *certiorari* and reversal.

On May 23, 1946, the petitioner was sentenced by the District Court for the Eastern District of Michigan, to two consecutive terms of 10 years each and to two separate fines of $10,000 each for alleged violations of the Stolen Property Act (U.S.C.A. Title 18, Sections 415 and Section 418 (a)). He has been incarcerated in consequence of this stence since February 19, 1948. On December 8, 1948, the Court of Appeals for the Sixth Circuit, having before it only the record made at the trial and not having cognizance of the important matters now undisputed on the presently standing record, affirmed. *Gordon* v. *United States,* 164 F. 2d 855.

This Court denied certiorari. See *Gordon* v. *United States,* memorandum order, 320 U. S. 798.

Petitioner has never been accused of physical participation in or presence at or near the larceny of which he is convicted. That crime was committed by Banning and confederates in a hotel room in Detroit, from which they stole various articles of jewelry left in the room by one Ollendorf, a jewelry salesman. Petitioner's complicity was supposed to have consisted in his acting as a "fence" for

Banning, petitioner having allegedly financed this and other crimes of Banning's and the latter's associates, and in that wise having acting as an accessory. (*Original Opinion of the Court of Appeals*, pp. 857-8).

Both the Trial Judge and the Court of Appeals have explicitly recognized that credence in Banning's testimony was essential to petitioner's conviction.[3] No person other than Banning has ever named petitioner as a recipient of any part of the stolen jewelry in question.[4]

On May 19, 1948, pursuant to Rule 33 of the Rules of Criminal Procedure, the petitioner filed his motion in the District Court for a new trial upon the grounds that:

> (1) Banning, whose testimony both the Trial Court and the Court of Appeals had explicitly recognized as essential to appellant's conviction, had repeatedly recanted his testimony since the petitioner's conviction in matters both vitally material and jurisdictional.
>
> (2) There now exists affirmative and undisputed proof that Banning perjured himself on the trial to the knowledge of Government officials when he testified that he had no ulterior inducement to incriminate the petitioner, and that he had neither been promised anything, nor had he been thinking about it, nor had he any hopes that by giving the Government the "information" he could make a deal. This evidence consisted of proof that soon after Banning's implication of petitioner he had received (a) A pardon from the

[3] The Court of Appeals said at page 857 of its original Opinion: "The conviction" (of appellant in this case) "was based principally upon the testimony of Herman Frank Banning, a co-defendant under the indictment."
In his charge to the jury on petitioner's trial, the Trial Judge said: "I think that the Government case must rest or fall on Banning, all of it" (Or. Tr. 437).

[4] Of Banning's character the Court of Appeals said (Tr. 237-38): "Banning was a hijacker, burglar, holdup man, and jewel thief. On Gordon's trial he admitted he had been guilty of repeated perjury as a witness in other trials. He further told of a score of vicious crimes he had engaged in and of various prison terms he had service in different parts of the country."

20 years Federal sentence he was serving, (b) The dismissal of another Indictment for Robbery pending against him at Cleveland, (c) Permission to go at large upon his own recognizance (after Gordon's conviction) despite his plea of guilty to the crime for which petitioner was sentenced to 20 years, and (d) the procurement of a job for him by Government officials.

(3) Further new evidence of appellant's innocence.

(a) Evidence that one Zussman, tried as a co-defendant with Gordon and serving a sentence of 5 years, now entirely exonerates Gordon while implicating himself and stating that he had been unable to testify for Gordon in his trial since by doing so he would have revealed his own guilt.

(b) Evidence that Banning's wife knew of his plan to free himself by accusing Gordon, but had been threatened by an FBI agent with prosecution for "perjury" if she attempted to testify in Gordon's favor on the trial.

(c) Evidence that two other co-defendants, Bernard Sidran and Howard Graves, who had been indicted with Gordon, but who had not been tried with him, since they were incarcerated at the time at the Ohio State Penitentiary, also exonerated Gordon.

(d) Evidence that various and divers favors over a period of 2 years before Gordon's trial had been extended to Banning from which he clearly knew that he could secure immunity if he accomplished the conviction of Gordon,[5] as well as undenied evidence of a bet made with him upon the subject by the FBI agent in charge.

The Government's answer to appellant's petition was filed July 16, 1948. Hearing was had before the Honorable Frank A. Picard on December 7, 1948, and the matter taken under advisement.

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[5] Banning deposed (Tr. 185) that two agents interviewed him several times at Leavenworth and said that they were anxious to get evidence against Meyer Gordon; that they told him that if he would "cooperate" he and his wife would not be convicted for a Fort Wayne jewel robbery, and that if he furnished evidence against Gordon nothing would happen to his wife, and "it would go me a lot of good." This is absolutely undenied.

On petitioner's trial Banning swore positively that he had no ulterior motive in implicating petitioner. He testified:

> "I haven't been promised anything. I haven't been even thinking about it" (Tr. 181). "It is not true that I hoped by giving them that information I could make a deal" (Tr. 181).

The Government argued Banning's supposed lack of material inducement to testify against petitioner. The attorney prosecuting the case said to the jury in his argument, "He" (Banning) "has been promised nothing." Further assurance on the part of the prosecutor that Banning had been promised nothing is quoted in the margin.[6]

After petitioner was convicted, Banning received the following rewards for his testimony against petitioner:

> (a) A pardon from the 20 year Federal sentence he was serving, (b) The dismissal of another indictment for robbery pending against him at Cleveland, (c) Permission to go at large upon his own recognizance (after Gordon's conviction) despite his plea of guilty to the crime for which petitioner was convicted, and (d) The procurement of a job for him by Government officials, (d) As disclosed by Petitioner's

[6] "He asked Banning if he had made any deal, and that implies a deal between the government and Banning in relation to his testimony here, and Banning said no. He asked if he had been promised anything by way of pardon or parole, and Banning said no. And he has been promised nothing. *The day he took that witness stand and all during the time he was in court, he is standing in court under sentence of twenty years. He is facing another twenty years by his plea of guilty to this indictment, and he is facing another ten years in Cleveland.* He has been promised nothing. The fair thing to do is the think we did. He told you about this Akron job. It was investigated by the FBI and they checked on the story as told by Banning with the people who were held up. You heard the story as told you by Mr. Rosfelder and it coincides. *If we had taken the story as we got it from Mr. Rosfelder and taken steps to have Banning exonerated from the twenty-year sentence he is doing by virtue of the testimony of McMann, defense counsel would be in here singing another story, the fact that we let him out of a twenty-year sentence to testify against Gordon, and you can be assured that is what they would have told you. So we did the fair thing.*" (Tr. 38-39.)

motion to Remand, the dismissal of an information for robbery pending at Omaha.

After Banning had thus gained his freedom, he was re-arrested after having robbed several filling stations and shot a policeman. He is now serving 50 to 60 years in a State prison for these latter crimes. (*Present Court of Appeals Opinions,* Tr. p. 333.)

After his re-arrest above mentioned, Banning executed the recanting affidavits that are in part the basis for the instant motion for new trial. In these affidavits he categorically retracts his implication of petitioner. They may be read in full in the record (Tr. 10-14 and 181-190). It is sufficient for any question sought to be raised in this court to summarize them thusly: Banning now says in substance that he did *not* "see Meyer Gordon that day in the Southmore Hotel, as I testified, nor did I have any conversation with him relative to the jewelry stolen from Ollendorff on that day, or any other day." In his third recantation affidavit, executed after he had been sentenced and was serving a term of 50 to 60 years he deposes:

> "the Government intended to have me indicted for a jewel robbery at Fort Wayne, Indiana. They told me that if I would co-operate with them they didn't think that my wife or I would be indicted. I asked them what they meant and they told me that they had been sent to interview me and said that they had been trying to get evidence against Meyer Gordon, a fence in Chicago, for a number of years, and promised me that if *I would furnish evidence to convict him nothing would happen to my wife and it would do me a lot of good.* These men later returned with the same propositions and all in all they visited me three times, each time giving me time to think it over " (Tr. 185). (Italics supplied.)

This last statement of Banning stands absolutely undenied in the record. Further details of the inducements which

he says were given him for his testimony may be read in the transcript at 187 and 188.

Petitioner's motion for a new trial was also supported by the affidavits of Zussman, a co-defendant, tried with Gordon and sentenced to 5 years. Zussman was one of those who had perpetrated the Ollendorff robbery.

According to Zussman, appellant's "name was never mentioned in any conversations I had with Banning before or after the robbery" (Tr. 25).

According to Zussman's affidavit (Tr. 24-25), made after his incarceration and the denial of his appeal, he knew at the time of Gordon's trial that Gordon was completely innocent of any participation in the "Ollendorff" robbery, and knew that the testimony of Banning implicating Gordon was completely false, but was afraid to take the stand in Gordon's behalf to refute Banning's testimony because in doing so he would have to confess implication in the robbery. He further stated he had never heard of Gordon prior to the indictment.

Graves' affidavit was to the same effect (Tr. 41-51).

Thus Banning's testimony, upon which both the District Court and this Court have said appellant's conviction depends, is now impeached, discredited and nullified by his own retractions of the statements whereby he implicated appellant, by his wife's affidavit that he was in contact with a jeweler in Minneapolis at times material to the question of appellant's guilt, and that Banning at that time implicated this Minneapolis jeweler, and by three of his confederates, none of whom were available to appellant at his trial, and all of whom damn Banning's testimony in the trial as rank prejury insofar as it named Gordon as an accomplice in the crimes.

Sidran's affidavit deserves consideration in view of the Trial Court's subsequent secret interview with him at the penitentiary in Ohio. Banning had sworn on petitioner's trial that Sidran drove Banning from Detroit to Chicago and introduced Sidran to petitioner in connection with projected jewel robberies. Sidran was not available as a witness for petitioner on the latter's trial. But his affidavit (Tr. 40-51) positively deposes that he did *not* drive with Banning in an automobile to Detroit and had nothing to do with the robbery.

Banning's wife Julia also deposed in favor of petitioner that she knew of Banning's plan to gain his freedom by convicting the petitioner. She was asked by Banning to "cooperate" and refused. An FBI agent threatened to prosecute her for "perjury" if she testified for Gordon on the trial. The agent in question denied this but did volunteer that it would not be advisable for her to take the stand and give "false testimony to aid the defendant Gordon, because if she did consideration might be given by Federal authorities to prosecution of her for perjury" (see Opinion of Court of Appeals, p. 5).

The District Judge's Visit to the Witness Sidran in the Penitentiary and His Attempts to Confirm or Impeach the Witness' Extra-judicial Statements by Extra-judicial Investigation. His Refusal to Hear Any of the Witnesses in Open Court.

The District Judge who had heard appellant's original trial and who was entertaining the instant motion undertook, without notice to, consent from or the presence of appellant or any of his counsel, to visit the material witness Sidran at the Ohio State Penitentiary, there interviewed him secretly (save for the presence of the Warden),

received statements *exculpatory* of appellant, and then, mistrusting these statements, invoked (still without the knowledge, consent or presence of appellant or any of his counsel) the offices of the Federal Bureau of Investigation in confirming or discrediting Sidran's statements.

The full text of the Judge's recital of this private and extra-judicial inquisition can be read in the Transcript at pages 221 to 223. The Court announced this trip as "news" to everyone (Tr. 220). The Judge sustained correspondence with Sidran and read fragments of this correspondence into the record at p. 222. For the immediate convenience of the Court we reproduce a part of his remarks and his reading of his private correspondence with Sidran:

> "I don't mind telling you gentlemen that this case has disturbed me quite a bit, and it has disturbed me because I don't want to keep an innocent man in jail. And I haven't rested by listening to you and to the District Attorney's office. I went out to get the information myself. I may have taken an opportune time to get part of it, but that is all right, I was going to do it anyway. I also insisted the F.B.I. get the report from Washington that the daughter told me had been filed in Washington. I went through that, took it home over the week end.
>
> Mr. Frederick: May I intrude at this moment with reference to the affidavit of Sidran and Graves, or am I interrupting?
>
> The Court: I want to tell you this: Here is what I wrote to Sidran the other day. **I thought this would be news to you.** Who is the other agent?
>
> Mr. Iseman: I was with you in your office the other day.
>
> The Court: Have I stated everything correctly?
>
> Mr. Iseman: To the best of my knowledge, yes, as it actually happened.
>
> The Court: This is the letter I wrote to Sidran:

"December 2, 1948

Mr. Bernard G. Sidran
Ohio State Penitentiary
Columbus, Ohio

Dear Sir:

When I interviewed you at the Ohio State Penitentiary on November 21, last, in the presence of the Warden, you stated that you could not have participated in the robbery that occurred in Okron, Ohio, August 28, 1940 nor could you have participated in the jewel robbery in Detroit, September 13, 1940 because—you stated—you were 'on a lake trip to Toronto, Montreal and Quebec.'

At your suggestion I contacted the FBI—"

He said, "If you will get that for me, that will prove that Banning is lying." I said, "I know Banning has difficulty telling the truth, but that will certainly help Mr. Gordon if it is true." And I said, "You claim that they aren't getting that. I will see they do get it."

"At your suggestion I contacted the FBI—"

that the two tickets you and your wife purchased were for a trip which started in Detroit, August 20, 1940 and you returned to Buffalo, August 26, 1940. Some of the passengers took the train from Buffalo to Detroit on August 27, 1940 arriving here the same day. So you could have been in Akron on August 28, and you certainly could have been in Detroit on September 13."

He could have been. I don't say he was.

"Incidentally our information also shows that near the end of 1946, your wife called on Mr. Morris G. LaBelle of the Canada Steamship Lines and tried to get him to give her the two tickets which were used by you on that trip. This he refused to do; so at least your wife must have known that it was very possible for you to have been in Akron and in Detroit on the days mentioned.

"If there is any other evidence you can give me I will be very glad to check on it."

It thus appears from the Judges' recital and observations *cf.* his expression "There goes Sidran's affidavit." (Tr.

223), which observation was made in contemplation of material extra-judicially investigated, that the Judge gave weight to his reflections upon his private inquiry thus undertaken (See also Tr. 224).

The Trial Judge's Refusal to Hear Witnesses in Open Court.

Upon appellant's original motion, and again in his reply to the government's answer, appellant requested the Court, in the event that doubt arose in his mind concerning the integrity of the affidavits attached to the papers, that all of the material witnesses be called into open court and cross examined by both sides and by the Court concerning the facts. As evidenced by his own expressions (Tr. 209, 221), the various materials presented by the defendant's motion did indeed raise grave doubts in the Court's mind. Nevertheless, the Court although interviewing Sidran privately, summarily *refused* to call into court any of the witnesses who might have shed light upon the situation.

The opinion of the Court of Appeals states that the Judge undertook this extra-judicial investigation at the instance of petitioner's daughter. The Court of Appeals is inadvertently mistaken. Nothing in the record supports this statement.[7] The record does show that petitioner's daughter did take it upon herself to visit the Judge and ask him to call for an FBI report that had been suppressed. But, of course, the point is immaterial. But of course the Trial Judge would have no more right to make this judicial excursion at the request of petitioner's daughter than he would have to undertake it *sua sponte*.

[7] The trial court expressly admitted (Tr. 275) that the daughter had not requested him to go to Columbus. She had requested that he examine certain suppressed FBI reports. This he did and found that Banning had as petitioner's daughter claimed, repeatedly told FBI agents he had lied on the Gordon trial (Tr. 293).

The Order Denying the Motion for New Trial.

The District Judge denied appellant's motion for a new trial by memorandum order (Tr. 245).

In thus ruling the Trial Judge, according to his remarks in the record, drew an illicit inference from appellant's failure to testify in the trial (Tr. 231-234).

Appellant's Motion to Vacate the Order Denying a New Trial, that the Judge Disqualify Himself, and for Re-Assignment of the Motion to Any Other Judge in the District.

On December 28, 1948, the day succeeding notice to his counsel of the overruling of the motion for a new trial, appellant filed his verified Motion for an Order Vacating Judgment, having this Court Disqualify Himself, and for Reassignment of Cause to Any Other Judge in the District (Tr. 246-252). In substance this motion stated the facts summarized above with respect to the District Judge's extra-judicial investigation, specifically averred that it was without notice to or consent of appellant and asserted the contention argued on this appeal, viz., that the Judge, by deliberately undertaking to investigate the case in the manner above described, had disqualified himself from deciding appellant's motion.

From the government's answer it appears that there were letters written from the Judge to the United States Attorney's office concerning the evidence in this case while the motion for new trial was pending (Tr. 259-260).

The District Judge after extended colloquy (Tr. 270-304) denied this last motion of appellant (Tr. 304).

Appellant appealed from the order denying him a new trial (Notice of Appeal, Tr. 245) and from the order denying the appellant's motion to vacate the order denying a new trial and asking that the Judge disqualify himself (Tr. 305).

The Trial Judge made the following findings in denying the motion for new trial:

At the hearing on December 8, 1948, in this regard the Trial Judge stated (Tr. 203-204):

> "Banning as I remember, said that he went to the hotel, he actually saw Gordon up in the room when they had the jewels and made the bargain with them in that room. **If that testimony hadn't been here, Gordon could never have been convicted. I don't think I would even let it go to the jury because if he hadn't seen the man, there was no connection of Gordon with this case, except that incident in the hotel.**" (Emphasis supplied.)

At the same hearing (Tr. 231) the court recognized the devastating effect of the Banning recantations by stating:

> "**There couldn't be a jury in the world found now to believe Banning, and anybody that knows anything above trials knows that.** Nobody would believe Banning now, no jury would. I don't say nobody, but no twelve men would believe Banning now. So if I let Mr. Meyer Gordon out, I let him out. **If there is a new trial, there isn't a chance of [his] ever being convicted.**"
>
> "Mr. Frederick. By the same token and by the same line of reasoning, why should you believe Banning's testimony when given on the witness stand here vilifying or convicting Gordon, and disbelieve the recantation which has now been made?
>
> The Court: I didn't necessarily believe Banning.
>
> Mr. Frederick: The point is it is up to the jury.
>
> The Court: I have never at any time said I believed Banning, have I, at any place?"

While the petitioner's appeal was pending in the Court of Appeals it was discovered that the Government had given

Banning another reward for his testimony against the petitioner, in that after petitioner's conviction the United State's Attorney at Detroit had requested the County Attorney of Omaha, Nebraska, to dismiss an information for robbery pending against Banning in that jurisdiction, and in so doing had represented that Banning had been "useful" to the Government in convicting Meyer Gordon. The dismissal on its face showed it was done "at the request of the United State's Attorney at Detroit" (Tr. 317).

This was formerly denied, but the Government's own affidavits (Tr. 322 to 329) showed that the prosecutor requested the dismissal "in view of the active cooperation given to the Government by Banning". Demand was made upon the Government to produce the correspondence. This was refused. Petitioner requested the Court of Appeals to compel the disclosure of the correspondence and motion made to remand the case to the District Court for a reconsideration of his original motion in the light of this new evidence. This motion was summarily denied without opinion January 3, 1950 (Tr. 345).

SUMMARY OF ARGUMENT.

I.

The District Court's Findings That No Jury Would Now Convict Petition and That The Trial Judge "Did Not Necessarily Believe Banning" Entitled Petitioner to A New Trial as a Matter of Law.

Other Cases to the Same Effect.

II.

The Trial Judge's Secret Interview of a Witness and His Private Consultation of FBI Agents Should Evoke Certiorari and Reversal.

III.

Petitioner Was Entitled to a Vacation of the District Court's Judgment Because of the Evidence Discovered After the Trial Court's Decision and Suggested to the Court of Appeals.

IV

The Total Complex of Facts in This Case Evinces A Denial of Due Process and Should Elicit Certiorari.

ARGUMENT.

I.

The District Court's Findings That No Jury Would Now Convict Petitioner and That the Trial Judge "Did Not Necessarily Believe Banning" Entitled Petitioner to a New Trial as a Matter of Law.

The case of *Griffin* v. *United States,* 336 U. S. 704, decided while this case was *sub judice* in the Court of Appeals, is of the utmost significance. We therefore address that case immediately.

In the *Griffin* case a motion for a new trial was made after conviction of murder on the ground of newly discovered evidence, viz., the presence of an open knife in the pocket of the decedent.

All of the then Justices of this Court voted in favor of reversal. In an opinion concurred in by four other Justices, Mr. Justice Frankfurter for the majority reversed and remanded the case to the Circuit Court of Appeals for a determination of the question whether, under the law of the District of Columbia, evidence of "uncommunicated threats" were admissible. The majority were of the opinion that the Court of Appeals must first address itself to this issue of admissibility

> "in order to *rule out the inference* that the Court of Appeals may, in applying *U. S.* v. *Johnson,* 327 U. S. 106, *have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the Trial Court's discretion.*"

The court further said:

> "Were the Court of Appeals to declare that the controverted evidence was admissible according to the

law prevailing in the District *it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.*" (Emphasis supplied.)

Justices Vincent, Murphy, Douglas and Rutledge were in favor of summarily granting the motion for a new trial stating that

> "a contrary determination would be an abuse of discretion *for there is manifestly a reasonable possibility that the jury would lessen the verdict of first degree murder.*"

It is also of extreme significance that in its brief in opposition to Griffiin's appeal the Government itself, after first stating that it is well settled that the granting or denial of a motion for a new trial on the ground of newly discovered evidence is a matter resting within the sound discretion of the Trial Court, and in the absence of manifest abuse of such discretion is not reviewable on appeal and after stating that in exercising its discretion the Trial Court should be guided by the rule, among others, that the newly discovered evidence relied on must not only be material to the issues that were involved at the time, but such that its consideration by a jury at a new trial would probably result in a different verdict, then concedes as follows:

> "However, where the offense in question *is of a serious type,* and particularly in a capital case, *we believe that the rule as stated may place too heavy a burden on the defendant who moves for a new trial on the ground of newly discovered evidence, and that the proper rule should be that the newly discovered evidence relied on must be such that there is a* **reasonable possibility** *that its consideration by a* **jury** *at a new trial would result in the return of a different verdict.*" (Page 21, Brief for the United States, *Griffin* v. *U. S.*, October Term No. 417.) (Emphasis supplied.)

And so the proper test, as the government conceded and as all nine justices held, was not whether the *Court* believed the newly discovered evidence, but whether there is a *"reasonable possibility"* that its consideration by *a jury* at a new trial would result in a different verdict.

Now let us apply this standard to the instant case: The District Court has emphatically stated (Tr. 231) that "now no jury would believe Banning." Once the District Court reached this conclusion of fact, appellant's right to a new trial became not a matter of discretion, but automatic and absolute for not only was there a *"reasonable possibility"* that a new jury would acquit, but according to the trial judge, it was a foregone conclusion that they would do so.

Furthermore the proof is *absolutely positive that Banning* lied *on the vitally important point of whether he was testifying for material inducements. There is no evidence to the contrary.* The many favors shown Banning leave no doubt upon this point. The pardon received by him in the *Weiss* case, the dismissal of the Cleveland indictment, the failure to sentence him in the instant indictment, the procurement of a job for him by the government after the government had obtained his release, stand unexplained and uncontradicted in this record.

Therefore, even if the Trial Court had made a finding that Banning told the truth when he disclaimed personal inducement for implicating appellant, that finding would have been totally unsupported by any evidence. But, of course, the Trial Court made no such finding. As a matter of fact the court expressed his entire disbelief in the Government's ridiculous assertion that all this *largesse* had no connection with Banning's trial testimony (Tr. 235-236), saying he "was not naive enough" to believe it (Tr. 236).

Other Cases to the Same Effect.

The Court of Appeals for the Sixth Circuit held in the case of *Helwig* v. *U. S.*, 162 F. (2d) 837, as did the Court of Appeals for the Third Circuit in *U. S.* v. *Ward*, 168 F. (2d) 226, that the *criterion* for adjudication on motions such as this one is whether a *jury* would or reasonably might be expected to acquit in the light of the evidence adduced on the motion. Similarly in *Cleary* v. *United States*, 163 F. 2d 748, C. C. A. 9, it was held that if the evidence, so claimed to show the alibi, was actually newly discovered, it was a matter for the jury and *not for the Judge to consider its weight against the testimony of the complaining witness.* The court affirmed denial of the motion because it found that the evidence was not "newly discovered". See also *Martin* v. *U. S.*, 17 Fed. (2d) 973, at 976 (C. C. A. 5); *Pettine* v. *The Territory of New Mexico*, 201 Fed. 489 (C. C. A. 8); *U. S.* v. *Miller*, 61 Fed. Supp. 919.

A different criterion was suggested by Cardozo, J., when he presided over the Court of Appeals in New York. *People* v. *Shilitano*, 218 N. Y. 161, 112 N. E. 733. That great jurist said:

> "The court was not at liberty to shift upon the shoulders of another jury his own responsibility, but was charged with the responsibility to seek the truth himself."

This statement, despite the eminence of the Judge who uttered it, is in conflict with the pronouncement of both the minority and the majority in the *Griffin* case. But even if it be accepted as furnishing the standard for the Trial Judge in petitioner's case, petitioner is entitled to a reversal; for the Trial Judge said that he "did not necessarily believe Banning's trial testimony" and therefore

either did *not* "seek the truth himself" or if he did, he must have disregarded what he found to be the truth.

Other cases declaring that it is the Judge's belief or disbelief of the witness, not his conception of what a *jury* would believe or disbelieve, are *Cobb* v. *U. S.*, 6 Cir. 161 Fed. (2d) 814; *Blodgett* v. *U. S.*, C. C. A. 6, 161 Fed. (2d) 47. But, as we indicated above, even under this test, petitioner is entitled to a reversal.

Thus there is important diversity of authority as to the criterion which must guide a judge on motions for new trial for newly discovered evidence.

II.

The Trial Judge's Secret Interview of a Witness and His Private Consultation of FBI Agents Should Evoke Certiorari and Reversal.

In this Court's recent decision in *Williams* v. *New York*, 337 U. S. 241, this Court, *speaking specifically of extra-judicial evidence not comprising a part of the record*, said:

> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations."

The Court held, however, that informal inquiry might be made as to a convicted person's background for the purpose of sentencing him. But the Court said in a footnote:

> "Courts have treated the rules of evidence applicable to the trial procedure and the sentencing process differently."

The facts constituting the Judge's extra-judicial investigation of petitioner's case (1) by his interview with Sidran and (2) by his requesting the FBI to check Sidran's claim

of an alibi have been fully narrated in the Statement of Facts, immediately *ante*. They will not be repeated here.

Inherent in the "concept of ordered liberty" which is the essence of due process is the principle, far better established by inveterate tradition than by precedent, that a court must base its judgment upon materials adduced in open court and preservable in the record. (See *Downey* v. *U. S.*, 91 Fed. (2d) 223.)

This Court refuses to take cognizance of matter which an indigent prisoner, without counsel, physically appends to the transcript in the form of undenied affidavits that were not filed in the Trial Court and hence are not properly part of the record. *Carter* v. *Illinois*, 329 U. S. 173, 67 S. Ct. 216, 91 L. Ed. 172. It should therefore disapprove the egregious departure from judicial norms committed by the Trial Court in this case.

There is a direct conflict between the *rationale* of the opinion in the instant case and the declarations of the Supreme Court of Illinois upon the question whether an extra-judicial inquiry by the Judge on a motion for a new trial announced *per se* the denial of due process of the law.

In *People* v. *Cooper*, 398 Ill. 468, one Dorothy Cooper had been convicted of murder. The Trial Judge, while a motion for a new trial was under advisement, "expored the background of certain of defendant's character witnesses and then, pending disposition of the motion for a new trial, the Trial Judge took a view of the premises where the homicide occurred." The Supreme Court of Illinois, reversing, said at page 472:

> "In short, any private investigation by a court pending a motion for a new trial constitutes a denial to the defendant of the constitutional guarantee of due process of law."

In so holding, the Illinois Court followed its previous decision in *People* v. *McGeoghegan*, 325 Ill. 337. In that case, "'The trial court expressed grave doubts as to Fernekes' participation in the crime, and in order to determine the credibility of Fernekes' alibi witnesses sent an investigator to the State of Indiana.'" This investigator reported favorably to Fernekes, that his, he reported that the character witnesses whom he had investigated appeared to be responsible people. Nevertheless the Trial Court denied a new trial. The Supreme Court reversed, not because the Trial Court failed to give weight to the favorable report of his emissary, but because, so the Court held, it denied fundamental rights to conduct an extra-judicial investigation in a motion for a new trial regardless of results.

The Court of Appeals said that petitioner was not prejudiced by this excursion of the Trial Judge. But the Trial Judge himself, after having consulted FBI agents in connection with the results of his excursion stated into the record, "There goes Sidran's affidavit" (Tr. 223).

The very paucity of precedents upon this important question is eloquent. Almost never do judges make private excursions from their court rooms to "investigate" the facts in litigation pending before them by talking in private with witnesses. Yet, if such investigation were a licit judicial technique, it would be employed with the greatest frequency. But such cases as there are on the point generally hold it to be reversible error for a Trial Court without notice to the parties to conduct a private and extra-judicial investigation upon which, either in whole or in part, he may base his judgment. For the Court's convenience we collect and discuss these authorities in the margin.[8]

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[8] *Downey* v. *United States* (Court of Appeals for the District Court of Columbia) 91 Fed. 2d 223, is very pertinent. In that case a Trial Judge, confronted with sentences that he had imposed some four years

One of the paramount considerations interdicting this practice is that where a Trial Judge resorts to extra-judicial investigation, no record is preserved for that appellate scrutiny which is guaranteed by the laws of the United States and of the various States in criminal cases.

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before and that were ambiguous as to whether they were to run concurrently or consecutively, resorted to (1) his personal recollections and (2) to letters that he had received from the prisoner's family.

Based upon his personal recollections and the letters from the prisoner's family, he amended the language of the sentences so as to make it clear that they were to run consecutively.

The Court of Appeals held that consultation of extrajudicial material, viz., the judge's personal recollections and letters from the prisoner's family, was "too informal to insure fairness and accuracy, and too informal for review" and so constituted reversible error.

The Court of Appeals said:

> "In the determination of the question of fact involved, that is, the question whether the sentences as originally uttered were concurrent or consecutive, the justice, to the extent that he relied upon his own recollection and referred to circumstances and letters, was sitting as both judge and witness, and as witness he gave no evidence, in the legal sense."

The Court further said:

> "Documentary data referred to by the witness, such as the letters here, would have been produced and offered in evidence, subject to the scrutiny and possible objection of counsel."

Likewise in *Valentine* v. *Malone*, 269 Mich. 619, where the court, while hearing the case without a jury, went to the scene of an accident without the consent of either party to view the operations of a stoplight and drew therefrom certain conclusions upon which in part his judgment was based, the Court in reversing stated:

> "We still have in most things the controversial method of trial. If and when we adopt the inquisitorial method the court may, perhaps, without error make personal investigations and arrive at conclusions based thereon in disregard of the evidence adduced in court. The trial court was in error in arriving at the conclusion based upon his personal observations and not upon the testimony."

In this case it was pointed out where such methods are pursued there would be no way to review findings or verdicts based upon the weight of the evidence because no one could know the weight given to the evidence in court and to the personal observations based on inquisitorial investigation.

See also *People* v. *Cooper*, 398 Ill. 468; *Valentine* v. *Malone*, 269 Mich. 619, at 627-632; *Rowland* v. *Commonwealth of Ky.*, 243 S. W. 1055, 195 Ky. 802; *Richardson* v. *State*, 12 S. W. 870, 28 Tex. App. 216; *Denver Omnibus & Cab Co.* v. *J. R. Ward Auction Co.*, 47 Cal. 446; 107 Pa. 1073; 19 Ann. Cases 577; *Stephenson* v. *State*, 28 Ind. 272; 23 C.J.S. Par. 4192; 97 A. L. R. 326; 3 *Jones Comm. on Ev.* Par. 1409, page 2567.

We submit that the Trial Court's extra-judicial investigation in this case should evoke *certiorari* and reversal.[9]

III.

Petitioner Was Entitled to a Vacation of the District Court's Judgment Because of the Evidence Discovered After the Trial Court's Decision and Suggested to the Court of Appeals.

In the Statement of the Case, *ante,* we have explained how petitioner discovered after the Trial Court's decision positive evidence that the United States Attorney who prosecuted him requested a State Prosecuting Attorney in Nebraska to dismiss robbery charges pending against Banning in that State representing that Banning had been "useful" to the Government in prosecuting the petitioner.

This discovery was suggested to the Court of Appeals by petitioner's motion to remand (Tr. 310). The Court of Appeals denied this motion without opinion.

United States v. *Johnson,* 327 U. S. 106, recognizes the propriety of a motion to remand, addressed to the Court of Appeals while the case is pending in that Court, upon

[9] The Court of Appeals made an inadvertent misstatement of fact to the effect that the Trial Judge undertook his visit to Sidran at the behest of petitioner's daughter. In this the Court was in error. The Trial Court expressly admitted (Tr. 275) that the daughter had not requested him to go to Columbus. She had requested that he examine certain suppressed FBI reports. This he did and found that Banning had, as petitioner's daughter claimed, repeatedly told FBI agents he had lied on the Gordon trial (Tr. 293). The Trial Court said, "So I got the report from Washington and found out she was telling the truth" (Tr. 293). Nowhere is it suggested that petitioner's daughter requested the Trial Judge to interview Sidran at the penitentiary.

But the point is really not important. The petitioner's daughter, though motivated by the understandable solicitude for her father's welfare, had not authority to request the Trial Court to undertake any such excursion as this one. Certainly the Trial Court would have no authority to accede to such an importunity if it had been made, which, however, it was not.

the ground of evidence discovered since the Trial Court's decision.

Fairness to this Court compels us to grant that if this record were otherwise free of the grave errors already argued, this action by the Court of Appeals, however unjust it might be to petitioner, might not be of sufficient importance to elicit this Court's discretionary grant of *certiorari*. But when this summary action is considered in the light of the Court of Appeals' opinion sustaining the denial of petitioner's motion for new trial notwithstanding the Trial Court's explicit findings in his favor and its refusal to reverse notwithstanding the Trial Court's secret interview of the witness Sidran, this final refusal of the Court of Appeals to heed the very substantial merits of petitioner's ought, we think, to persuade this Court to grant certiorari if it is not already so persuaded by the considerations heretofore developed.

IV.

The Total Complex of Facts in This Case Evinces a Denial of Due Process and Should Elicit Certiorari.

Credence in Banning's testimony was essential to petitioner's conviction. Both the Trial Court and the Court of Appeals have so declared.

At the time of petitioner's trial, Banning swore positively that he had no ulterior motive in incriminating petitioner. It now appears without contradiction that before Banning testified, FBI agents at Leavenworth had three times attempted to persuade him to cooperate by promising him that "it would do him a lot of good" and that he and his wife would not be indicted at Fort Wayne. It is also uncontradicted that for two years before petitioner's trial,

Banning had been given extraordinary privileges, summarized in the margin.[10]

These facts were known to the Government at the time of petitioner's trial but were unknown to petitioner. Nevertheless the Government's counsel not only permitted Banning to swear that he had been neither given nor promised inducements for incriminating petitioner but argued Banning's alleged disinterestedness to the jury (Tr. 38-39).

Petitioner was deprived at his trial of the testimony of the witnesses Zussman, Sidran and Graves because the latter two were in the Ohio State Penitentiary, beyond the reach of subpoena, while Zussman, though tried with petitioner, claimed his privilege against self-incrimination and refused to testify. All of these witnesses are now prepared to exonerate petitioner.

The Trial Judge, although willing to interview Sidran privately, refused to hear any of these witnesses in open court himself. He likewise refused to hear the testimony of William Comb, a member of the Detroit Bar, who was willing to testify that he had received a letter voluntarily written by Banning in which Banning confessed his perjury on the trial (Tr. 192-193). Nor would the Trial Judge permit a jury to hear these witnesses.

It now appears that since petitioner's conviction upon Banning's testimony, Banning has received the many rewards heretofore enumerated. The Trial Judge has stated that he was "not naive enough to believe" either that Banning did not expect such rewards when he testified or that

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[10] Banning deposed (Tr. 186) that for two years while he was at the West County Jail he regularly, while being interviewed, was given steaks prepared at a Detroit Club; that he had various privileged positions such as running the elevator, running the jail store, and taking charge of the main gate to the jail. Additionally, it is uncontradicted that Agent Johnson, in charge of the FBI investigation, made a bet with him that if he convicted Gordon he would be on the street (Tr. 187—See Opinion of Court of Appeals Tr. 337-338).

the Government did not expect him to get them (Tr. 235-236).

The Trial Judge, after recognizing that Banning's testimony was essential to petitioner's conviction, has found and declared that no jury would now convict petitioner and that he himself did not necessarily believe Banning. The totality of these facts evinces such a denial of due process of law as to call for certiorari and reversal.

Conclusion.

For the reasons apparent on the record, suggested in the instant petition and urged in this Brief, we respectfully submit this Court should grant certiorari in this case and should reverse the judgments below.

Respectfully submitted,

RICHARD G. FINN and
WILLIAM C. WINES,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 548

MEYER GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 333-342) is reported at 178 F. 2d 896.

JURISDICTION

The judgment of the Court of Appeals affirming the order of the District Court denying petitioner's motion for a new trial was entered on December 5, 1949 (R. 332). On January 3, 1950, the Court of Appeals denied petitioner's motion (R. 310-312; and see R. 343-344), filed on August 19, 1949, to remand the cause to the District Court for reconsideration of its order denying his motion for

a new trial (R. 345). Petitioner's time for filing a petition for a writ of certiorari was extended, by an order of Mr. Justice Reed entered December 29, 1949, to and including January 20, 1950 (R. 346), and the petition was filed on January 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying a motion for a new trial on the ground of newly discovered evidence, consisting primarily of a recantation by the chief government witness of material portions of his trial testimony, the truth of which recantation was disputed.

2. Whether the trial judge committed reversible error in privately interviewing a prisoner who had made an affidavit filed in support of the motion for a new trial and in privately interrogating F.B.I. agents in an effort to verify the truth of the prisoner's statements.

3. Whether the Court of Appeals erred in denying petitioner's motion to remand the cause to the District Court for reconsideration of its motion for a new trial, the motion to remand being based on newly discovered evidence of the dismissal of a state charge against the principal government witness as an alleged reward for his testimony against petitioner.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Sixth Circuit (R. 332) affirming an order of the District Court for the Eastern District of Michigan (R. 245) denying a motion for a new trial on the ground of newly discovered evidence (R. 1-28, 37-51). The motion was filed a few days short of two years after petitioner's conviction of offenses under the National Stolen Property Act (R. 1). This conviction was affirmed by the court below, *Gordon* v. *United States,* 164 F. 2d 855, and this Court denied a petition for a writ of certiorari, 333 U.S. 862. In view of the fact that the motion for a new trial was predicated on the recantation by the Government's chief witness at petitioner's trial—one Herman Frank Banning, a codefendant who pleaded guilty—of certain material portions of his trial testimony, and since the truthfulness of this recantation was sharply in dispute in the proceedings on the motion, it becomes necessary to review at some length not only the evidence, in the form of affidavits and counter-affidavits, adduced before the District Court on the motion, but also the testimony given by Banning at the original trial and the Government's independent evidence corroborative of that testimony. References below to the original record of petitioner's trial, conviction, and appeal (No. 602, this Court, O.T. 1947) will be indicated by the designation "Orig. R." to

distinguish it from the record of the instant proceedings (designated "R.").

1. On September 11, 1943, petitioner and five codefendants—Banning, Bernard Sidran, Howard Graves, Abe Zussman, and Bernard Gridley—were jointly indicted in two counts (Orig. R. 1-6) for violations of the National Stolen Property Act. Count 1 charged them with having conspired to transport divers articles of stolen jewelry "in interstate commerce, to-wit, from cities and towns and communities and places in different states of the United States, and from the City of Detroit * * * to the City of Chicago" (Orig. R. 2), in violation of 18 U.S.C. [1940 ed.] 418a. Count 2 charged them with having committed the substantive offense of transporting, from Detroit to Chicago, on or about September 13, 1940, specified articles of jewelry stolen from one Walter Ollendorff (Orig. R. 6), in violation of 18 U.S.C. [1940 ed.] 415.

Banning pleaded guilty to these charges (Orig. R. 162), and was the chief prosecution witness at the trial, which resulted in the conviction of petitioner and Zussman on both counts (*id.* 48).[1] Banning's testimony, insofar as it implicated pe-

[1] The indictment was dismissed as to Gridley at the close of the Government's case (Orig. R. 410). Sidran and Graves were not tried, due to the inability of the Government to procure their presence for trial; they were incarcerated at the time in the Ohio State Penitentiary at Columbus, and the warden of that institution refused to honor a writ of habeas corpus *ad prosequendum* issued by the district court for their production (Orig. R. 52; R. 120, 158-159).

titioner in the offenses charged, may be summarized as follows:

On September 7, 1940 (Orig. R. 72), Banning, Sidran, and Graves went from Chicago to Detroit in search of a jewelry salesman to rob (*id.* 75-76). In Detroit, they decided to include a fourth person, Zussman, in their enterprise (*id.* 80). On September 13, 1940, these four, with the cooperation of Gridley, a bellboy at the Book-Cadillac Hotel, stole a quantity of jewelry from a salesman, Ollendorff, who was registered at that hotel (*id.* 79-84). Pursuant to agreement, Graves drove with the jewelry to Chicago, and Banning, Sidran, and Zussman proceeded separately to Chicago (*id.* 86, 89). On the morning of September 14, 1940, Banning registered at the Southmore Hotel under an assumed name (*id.* 90). Banning, Sidran, and Zussman then waited in the hotel lobby "for Graves to arrive with Mr. Gordon [petitioner]" (*id.* 91). Upon Graves' and petitioner's arrival, all but Zussman (who remained in the lobby) proceeded to Banning's hotel room, where petitioner examined the stolen jewelry and purchased it for $1,000 (*id.* 91-92).

The above-described interstate transportation of stolen jewelry was that charged in the substantive count (2) of the indictment. In addition, as further proof of the conspiracy charge (count 1) and as evidence of prior offenses similar in nature to that charged in the substantive count, Banning

testified to many other jewelry thefts perpetrated by himself and various associates, followed by interstate transportation of the loot to Chicago and its sale to petitioner. Banning first met petitioner in 1935, he testified, at which time he was introduced to petitioner as a "new man" (Orig. R. 102). On this occasion petitioner advanced money to Banning and several associates, including Graves, for expenses in connection with trips to be made from state to state for the purpose of stealing jewelry (*id.* 102-103). On other occasions thereafter petitioner advanced funds to Banning and Graves for such expenses (*id.* 116). Between 1935 and 1941, Banning and several associates, usually including Graves, engaged in approximately twenty-five armed jewel thefts and robberies (*id.* 76, 197), and, according to Banning, "we always sold our merchandise in Chicago" to petitioner (*id.* 87). Banning described in detail at the trial, in addition to the Ollendorff theft above related, thefts of jewels from salesmen in Columbus, Ohio, in March 1936 (*id.* 104-107), in Indianapolis, Indiana, in September 1936 (*id.* 111-115), in Nashville, Tennessee, in December 1936 (*id.* 109-111), near Houston, Texas, in April 1937 (*id.* 122-125), in Memphis, Tennessee, in November 1937 (*id.* 115-117), again in Indianapolis, in September 1938 (*id.* 117-118), in Grand Rapids, Michigan, in June 1939 (*id.* 120-121), in Spencer, Iowa, in August 1940 (*id.* 130-134), in Akron,

Ohio, on August 28, 1940 (*id.* 136-141), and in San Antonio, Texas, in February 1941 (*id.* 144-146).

Banning was the only government witness to identify petitioner as the recipient of the jewelry in the various thefts he described. However, Banning's testimony linking petitioner and himself in his criminal enterprises was thoroughly corroborated in at least two important particulars.

As the Court of Appeals pointed out in its opinion affirming petitioner's conviction (164 F. 2d at 859):

> Banning's story is sustained by independent evidence not only as to the robberies committed, but as to the leading part which appellant played in guiding and assisting the operations. * * *
>
> Banning said that he bought a number of cars during these years from an automobile dealer named Irving Braud, to use in the robberies, and that appellant assisted in the purchases. He declared that on one occasion he bought a Ford car for about $400, and only had ten or twenty dollars available for a down payment. He says that he told Braud to get the balance of the money from appellant, and that this was done. Also he said that he loaned Braud $2,000, which he got from appellant.
>
> Braud strongly substantiated this phase of Banning's testimony. He did business with a number of the confederates, including the appellant. * * *
>
> But Braud's testimony was corroborative of more than a mere close relationship between

appellant and the group. He testified that on one occasion he needed some money, and Banning told him to get it from appellant. The money, $2,000, was received by Braud, and no security was required. Braud testified categorically that he "did contact Meyer Gordon at his office," and that he "did get money from" appellant after Banning told him to go there. * * *

The second instance of corroboration was described by the Court of Appeals as follows (164 F. 2d at 857, 860):

> * * * Banning also testified that appellant interceded with a physician in Chicago in May, 1941, in order to arrange so that Banning would not be compelled to appear in Omaha on May 19, 1941, to answer to a jewelry robbery charge.
>
> * * * * *
>
> As to the incident of May, 1941, in which Banning described appellant as having arranged so that he would not have to answer to an indictment in a Nebraska state court, the corroboration is very complete. Appellant called a physician named Joseph Gale, whom he had known for ten or twelve years, and asked him to see Banning. Gale referred the matter to a Dr. Finkel, who sent a telegram, as requested, to Banning's attorney in Omaha. In the course of this incident Banning was entered at the Edgewater Hospital in Chicago, but it was found that he had nothing wrong

with him, and the medical director of the hospital ordered him dismissed after a few hours. Four physicians testified as to this incident completely corroborating Banning.

In addition to the above instances of corroboration of Banning's testimony insofar as it implicated petitioner, Banning's testimony as to his perpetration of numerous robberies was thoroughly corroborated by the victims of his offenses (see 164 F. 2d at 859).

Neither petitioner nor Zussman testified at the trial. The only evidence offered on petitioner's behalf was a letter written by Banning to his wife Julia, on June 27, 1943, from Leavenworth Penitentiary (Orig. R. 242-244). At that time Banning was serving a sentence for a crime (the robbery of a jewelry salesman named Weiss) which he did not commit (see *infra,* pp. 15, 25). In this letter Banning had written (Orig. R. 243):

> * * * Honey * * * the F.B.I. * * * wanted the people that worked with me and the fence * * *. * * * you remember * * * Abie Ginsberg from Minneapolis * * *. Well, *he was my fence* and they tell me he is dead * * * and one of the boys with me is dead, * * * so they are not doing much to help me, but if these people were alive perhaps I could of got a break * * * [italics added].

Banning was extensively cross-examined in regard to the quoted statements in this letter, which the

defense maintained were inconsistent with his trial testimony implicating petitioner as his fence in all his transactions. On redirect examination Banning explained the above statements in his letter by saying that at the time he wrote the letter he was having conversations with F.B.I. officials *truthfully* implicating petitioner as his fence, and that, knowing that his wife "was carrying to Gordon and Gordon's attorneys" "everything I told her," he "wrote this letter to throw them off so they wouldn't know what I was doing" (Orig. R. 259).[2]

In addition to cross-examining Banning concerning the above letter to his wife, petitioner's trial counsel repeatedly asked Banning if he had not tried to persuade his wife to cooperate with him in falsely implicating petitioner as his fence (Orig. R. 232-239, 245-247), and Banning denied ever having done so. He stated that he told his wife that he had decided "to tell the truth about everything," including "who fenced the merchandise" (*id.* 267).

Not only did petitioner refrain from personally testifying in contradiction of Banning's testimony against him, but he failed to call Banning's wife as a witness in contradiction of Banning as to the nature of the conversations had by her with him, and to support the defense contention (as evidenced by the above-related line of cross-examina-

[2] For a more detailed explanation by Banning of his motives in writing this letter *falsely* stating his fence to be a Minneapolis man named Ginsberg, see Orig. R. 255-263.

tion of Banning) that Banning sought to induce his wife to join him in "framing" petitioner. In fact, as we have pointed out, petitioner's sole defense was the introduction of Banning's letter to his wife of June 27, 1943, which she turned over to petitioner and his attorneys for use at the trial (R. 21; and see Orig. R. 260).

Petitioner was convicted and sentenced to ten years' imprisonment and fined $10,000 on each of the two counts of the indictment, the prison sentences to run consecutively (Orig. R. 50-51).

2. The instant proceedings began with the filing, on petitioner's behalf, on May 19, 1948, of a motion for a new trial on the ground of newly discovered evidence (R. 1-10), the new evidence relied on consisting principally of admissions by the Government's witness Banning that he perjured himself at petitioner's trial. Four supporting affidavits were attached to the motion, consisting of two recanting affidavits by Banning (Exhibits A and B, R. 10-13, 14-16), and affidavits by Banning's wife (Exhibit C, R. 16-22) and the convicted codefendant Zussman (Exhibit E, R. 24-25).[3]

In Banning's first affidavit (R. 10-13), dated March 30, 1948, he stated that the testimony he had given at the trial relative to the Ollendorff theft (on which the substantive count of the indictment was predicated) was true up to the time of the

[3] Also attached to the motion were affidavits by the attorneys (Exhibits D, F, and G, R. 22-23, 26-27, 28) who procured the principal affidavits.

"actual theft," but was false insofar as it implicated petitioner as the recipient of the stolen jewelry involved in that case (R. 11-12). He said that when Sidran, Zussman, and he arrived in Chicago from Detroit on the morning of September 14, 1940, following this theft, he checked in at the Southmore Hotel, while Sidran and Zussman "went on presumably to meet Graves"; that later that day he left the hotel and flew to Louisville, Kentucky; that five or six days later Graves told him in Chicago "how much he received for the jewelry and paid me my share"; but that he "did not see Meyer Gordon that day in the Southmore Hotel, as I testified, nor did I have any conversation with him relative to the jewelry stolen from Ollendorff on that day, or any other day" (R. 12). He said the reason why he testified falsely to having met petitioner and shown the Ollendorff jewelry to him in the Southmore Hotel was a "personal grudge" he had against petitioner "arising out of his association with my wife" (*ibid.*). He also said that he testified against petitioner because he "was well aware of the fact that unless a conviction was had against Gordon, I would not receive any consideration from the Governmental authorities" (R. 11). His affidavit also contained the following statement (R. 10):

> * * * As to why Sidran and Graves were not tried at the same time [as petitioner, Zussman, and Gridley (see footnote 1, *supra*, p. 4)] I have not been advised, however, I ad-

> vised agents of the Federal Bureau of Investigation and Thomas P. Thornton, then Assistant United States' Attorney for the Eastern District of Michigan, that I would absolutely refuse to testify in the trial if Sidran and Graves were brought back from Columbus, Ohio and placed on trial. * * *

In his second affidavit (R. 14-16), dated a week later, April 6, 1948, after stating that he did nothing at the Southmore Hotel on September 14, 1940, other than change his clothes, rest, and make a plane reservation for Louisville, Banning added that, though he had received "no definite promises" from the Government in exchange for his testimony against petitioner, he "was satisfied in my own mind", from his treatment by and conversations with government officials, that he "would be discharged from the sentence I was then serving [for a crime he did not commit; see pp. 15, 25, *infra*]" and "would not be sentenced on the Ollendorff transaction" if he testified against petitioner (R. 14). He felt confident of this, he added, because "[t]he Government agents were so determined to get Meyer Gordon" (R. 15).

In Banning's wife's affidavit (R. 16-22), dated April 1, 1948, she told about receiving the letter of June 27, 1943, from her husband, written from Leavenworth Penitentiary (this being the letter in regard to which Banning was so extensively cross-examined at petitioner's trial; see pp. 9-10, *supra*), in which he told her that "Abie Ginsburg from

Minneapolis * * * was my fence" (R. 17). She turned this letter over to petitioner's attorney, she stated, upon later learning that her husband was planning to testify falsely against petitioner (R. 21). She further stated that on August 6, 1943, when she visited her husband in the county jail at Detroit, he told her that "he was going to get out, but that he had to talk on a man in Chicago named Meyer Gordon", and asked her "if she would 'cooperate' and say whatever he told her to say about Meyer Gordon" (R. 17-18); that on several subsequent occasions during the next three years her husband renewed his request that she "cooperate" with him in "framing" petitioner (R. 19); but that she refused to do so (R. 18, 19). She further stated that an F.B.I. agent named Victor Johnson similarly importuned her to " 'cooperate' with her husband" and threatened to prosecute her for perjury "in the event that she testified in behalf of Mr. Gordon and contradicted her husband" (R. 18, 19, 20).

In Zussman's affidavit (R. 24-25), dated April 28, 1948,[4] he admitted his own participation in the Ollendorff theft, but stated that he had never heard of petitioner until the return of the indictment in the instant case; that he then knew that petitioner was innocent of any complicity in the

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[4] Zussman, a narcotic addict, was at that time a prisoner-patient in the United States Public Health Service Hospital, Lexington, Kentucky, where he was confined following his conviction in the instant case (R. 24, 26, 198-199).

Ollendorff theft; but that he could not take the stand to so testify because, to do so, he would have had to confess his own participation in that theft (R. 24). He explained how he knew of petitioner's innocence in the Ollendorff matter by saying that it was his "understanding from the conversation between the other men [following the theft], that they expected to dispose of the merchandise to a person named Abe Ginsberg" (R. 25). He added that he himself had "had nothing to do with the disposal of the merchandise" in that case (*ibid.*).

The motion for a new trial, in addition to calling attention to Banning's recanting affidavits and the other affidavits above described, alleged that, following petitioner's conviction and "for the purpose of rewarding" Banning for his part in convicting petitioner, the following things were done for Banning by the Government: (1) Banning received a Presidential pardon, pursuant to a petition prepared by the Assistant United States Attorney (Mr. Thornton) who successfully prosecuted petitioner, for the crime for which he, Banning, was serving a 20-year sentence in Leavenworth Penitentiary when he testified against petitioner; (2) Banning, notwithstanding his plea of guilty to the instant indictment and notwithstanding his admission of many armed robberies in his testimony in the instant case, was freed on bond following his receipt of the above Presidential pardon on June 7, 1947, and remained at liberty until February 21, 1948, when he was captured by Detroit

police in connection with the holdup of some gasoline filling stations, in the course of which he was shot and wounded in a running battle with the police; and (3) a federal indictment pending against Banning in Cleveland, Ohio, was dismissed, notwithstanding that he had confessed to the charges thereof in his testimony in the instant case (R. 5-6). All these "rewards", it was contended, tended to substantiate the truth of Banning's recent admission (in his recanting affidavits) that he perjured himself in testifying against petitioner in the hope of receiving consideration from the Government for his assistance in convicting petitioner.

In an amendment of his motion for a new trial (R. 37-40), filed July 2, 1948, petitioner directed the court's attention to the existence of two affidavits executed in Ohio State Penitentiary, Columbus, Ohio, by the codefendants Sidran and Graves in March 1947, at which time petitioner's appeal from his original conviction was pending in the Court of Appeals (R. 40). These affidavits had originally been filed in support of a motion, filed in (and denied by) the Court of Appeals, to remand the cause to the District Court for the purpose of entertaining a proposed earlier motion for a new trial (*ibid.*). In the amendment of the instant motion for a new trial, it was averred that these affidavits corroborated Banning's recanting affidavits "in that they assert this defendant's innocence of any participation in the offense for

which he stands convicted" (*ibid.*). Copies of Sidran's and Graves' affidavits were attached to the amended motion as Exhibits X (R. 41-47) and Y (R. 47-51), respectively.

Sidran, in his affidavit (R. 41-47), dated March 11, 1947, stated that "had he been present at this trial [see footnote 1, *supra,* p. 4, as to why Sidran, though a codefendant, was not present], he would have testified in his own behalf in refutation of the testimony of * * * Banning" (R. 45). He had met Banning only once, Sidran stated, either in the latter part of 1939 or early in 1940 (*ibid.*). Contrary to Banning's trial testimony, Sidran further stated, he did not see petitioner in any Chicago hotel in September 1940; did not participate in the Ollendorff theft; did not participate with Banning in various other jewel thefts in which Banning had implicated him; and had never had any dealings with petitioner (R. 45-47, 43). Sidran further stated that he and his wife were "on a Great Lakes Cruise through the Thousand Islands" during the latter part of August and the early part of September 1940; that they did not return from this cruise until September 10, 1940; and that on September 13, 1940 (the date of the Ollendorff theft), he took his pregnant wife to a Dr. Hyman Mellon (R. 46). This proved, he stated, that he could not have participated either in the Akron holdup of August 28, 1940, or the Ollendorff theft, in both of

which Banning's trial testimony had implicated him (R. 46-47).[5]

Graves, in his affidavit (R. 47-51), also dated March 11, 1947, contradicted Banning's trial testimony implicating him in the Ollendorff theft and various other thefts occurring in 1940, and claimed that he had not even seen Banning during that year (R. 50-51).[6]

3. On July 16, 1948, the Government filed an exhaustive motion (R. 52-79), supported by numerous affidavits and other materials (R. 80-169), for an order denying petitioner's motion for a new trial. The Government's motion sought to show that Banning's recanting affidavits were false and given under most suspicious circumstances; that the other affidavits in support of the motion for a new trial were also false; that Banning's trial testimony, which the jury believed after being carefully cautioned to scrutinize it with care, was credible, true, and corroborated in vital respects; and that petitioner had had it in his power, at the time of his

---

[5] It should be noted that insofar as Sidran, in this affidavit, denied complicity in the Ollendorff theft, he is contradicted not only by Banning's trial testimony, but also by the latter's recanting affidavits (see pp. 11-13, *supra*).

[6] As in the case of Sidran (see footnote 5, *supra*), Graves was contradicted not only by Banning's trial testimony, but also by the latter's recanting affidavits, insofar as he denied complicity in the Ollendorff theft (see pp. 11-13, *supra*).

Mr. Thornton, the Assistant United States Attorney who prosecuted petitioner, stated in an affidavit that when Banning read Sidran's and Graves' affidavits, he called them "liars" (R. 122). See also pp. 27-28, *infra*.

trial, to demonstrate the falsity of Banning's testimony implicating him (if it was false) by numerous witnesses, including petitioner himself.

Victor Johnson, an F.B.I. agent who participated extensively in the investigations leading up to the indictment and conviction of petitioner, stated in his affidavit (R. 83-88) that Banning never stated to him that he would refuse to testify against Sidran and Graves, though he expressed a "desire" not to testify against his friend Graves (R. 84); that in all his conversations with Banning, the latter told him he was willing to "tell the truth" against petitioner because the latter had "failed to take care of him" following his, Banning's, arrest in 1941, and had failed to keep his promise of financial assistance to his, Banning's, wife and mother (R. 84-85); that he "never made any promises to Banning that he would receive any consideration from the Government in exchange for his testimony" (R. 85); that he was interested solely in obtaining "the true facts in relation to the activities of Meyer Gordon and the other persons involved" (*ibid.*); that he never sought to induce Banning's wife to "cooperate" by giving false testimony against petitioner (R. 85-88); that he asked Mrs. Banning to testify for the Government, but that she declined because, she said, she did not wish to be a "stool pigeon" and because she feared for her personal safety if she testified (R. 86-87); and that he never told Mrs. Banning that if she contradicted her

husband and testified on behalf of petitioner, the Government would prosecute her (R. 88), though he did tell her that "it would not be advisable for her to take the stand and give false testimony to aid the defendant Gordon, because if she did, consideration might be given by Federal authorities to prosecution of her for perjury" (R. 87).

Joseph Iseman, another F.B.I. agent, stated in his affidavit (R. 93-104) that on February 21, 1948, he and a fellow agent, Karl Zeimes, were told by Senior Inspector Marvin Lane of the Detroit Police Department that William Comb,[7] an attorney, had asked Lane for, and been granted, permission to visit Banning in the Detroit Receiving Hospital (R. 94). Banning had been admitted to this hospital on the preceding day, suffering from wounds received in a gun battle with Detroit police arising out of the armed robbery of some gasoline stations (R. 93-94; see pp. 15-16, *supra*). On February 24, 1948, Iseman and Zeimes visited Banning in the hospital, and asked him, among other things, who had been in to see him; Banning replied that Comb had visited him, but only "as a friend," explaining that Comb had once represented him as an attorney (seven years previously), but was not acting in that capacity at that time (R. 94). Banning added that Comb was going to do some favors for him—

[7] Comb was the attorney who prepared for Banning's signature the latter's two recanting affidavits of March 30 and April 6, 1948 (R. 28); in his interviews with Banning incident to the latter's execution of these affidavits, Comb was acting on behalf of petitioner's wife, Mrs. Rose Gordon (*ibid.*).

collect some wages due him, and do what he could for Banning's "girl friend," who had been arrested for parole-violation shortly after Banning's latest apprehension (R. 94-95).

Iseman further stated in his affidavit that, during this February 24 conversation with Banning, Banning told him that on the preceding Tuesday (February 17) someone called Banning on the telephone and offered him $5,000 if he would "help Gordon," but that Banning refused to discuss the matter (R. 96). Iseman and Zeimes then asked Banning "whether anyone else ever made any recent offers to him in an attempt to get him to alter the testimony given at the trial" (R. 97). Banning replied in the negative, and added that "it would not do any good if they did" because all of his trial testimony was true (*ibid.*). Iseman further stated that Banning asked him and Zeimes on this occasion to "help him get out of the custody of the State authorities and into the custody of Federal authorities" (R. 103).

Iseman further stated in his affidavit that Banning, after remaining approximately one month (February 20 to March 19, 1948) in the Detroit Receiving Hospital, was transferred to the Detroit City Jail, where he remained four days, until March 23, 1948, on which date he was removed to the Wayne County Jail, where he remained until June 23, 1948, when he was transferred to the State Prison at Jackson, Michigan, to start serving a

50- to 60-year prison sentence for assault with intent to commit murder, imposed June 22 (R. 94, 104). On May 24, 1948, Iseman stated, he checked the records of the Detroit Receiving Hospital and the Wayne County Jail to determine the frequency of Comb's visits to Banning (R. 95). He found that the Receiving Hospital kept no record of visitors, but ascertained that in the two-month interval between March 23, 1948, when Banning entered the Wayne County Jail, and the date of Iseman's check of the records, Comb had visited Banning on 27 different occasions (R. 95-96). The records further showed that Comb's visits with Banning, commencing on the very day of Banning's admission to the jail (March 23), continued almost daily to March 30 (the date of Banning's first recanting affidavit), and again almost daily to April 6 (the date of his second recanting affidavit) (R. 95).

During the month of May 1948, Iseman further stated, Banning told him that, on the occasion of Comb's first visit with him in the Wayne County Jail, he "told Comb that he did not observe Gordon get the jewelry which had been stolen in the Ollendorf robbery" (R. 97). Comb replied that "this information was no good and wouldn't help anyone" (*ibid.*). A day or so later, Banning further told Iseman, Comb "brought a sheet of paper with some questions written on it in regard to the 'Ginsberg letter' Banning had written to his wife" (see

pp. 9, 13-14, *supra*); Comb read the questions to Banning, who answered "No" to each; at the end of the questioning, Banning told Comb that "Anyone who sat through the trial of this thing would know there is nothing to that Ginsberg deal" (see pp. 9-10, *supra*) (R. 97). After extended questioning by and conversations with Comb, who took extensive notes, Banning further told Iseman, "Comb returned with an affidavit. * * * [Banning] did not read the first draft of the affidavit very carefully, and signed the first draft brought to him. Thereafter Mr. Comb returned with a supplemental affidavit which Banning signed" (*ibid.*). "When questioned generally about why he had signed the affidavits," Iseman further stated, Banning "stated that he signed the affidavits to rid himself of the name of 'stool pigeon' and 'to take the heat off' with his fellow prisoners at Wayne County Jail" (R. 98). Banning added that, on an earlier occasion when he was confined in that jail, he had "tipped off the jail authorities" about a proposed prison break; that other prisoners then in Wayne County Jail, but subsequently transferred to "Michigan State prisons," had since learned of this action of Banning; and that he believed that "if he is placed in any 'Michigan Pens' he will get 'a shiv in his back'" (*ibid.*). Banning further told Iseman that the statement in his March 30 affidavit that he had "absolutely refused to testify in the trial of Meyer Gordon

* * * if Sidran and Graves were brought ba
from Cleveland, Ohio, and placed on trial" "shou
not have been in the affidavit and would not ha
been in there if he had read it carefully" (*ibid*
Banning further told Iseman that "while he d
not personally see Gordon receive the jewelry fr
the Ollendorff robbery, he felt sure that he h
received it because he, Banning, Graves, and Sidr
had always disposed of all jewelry they had stol
to Gordon" (R. 99). Banning further told I
man that the statements in his April 6 affida
that "the Government Agents were determined
get Meyer Gordon" and that he was convinc
that in return for his testimony he would be "
the street", were untrue (*ibid.*). Banning also to
Iseman that he had never been promised lenien
by the Government in return for his testimony (
101-102). Banning also contradicted, according
Iseman, various statements in his wife's affida
(see pp. 13-14, *supra*) to the effect that he a
agent Johnson ever attempted to persuade her
"cooperate" by giving false testimony against pe
tioner (R. 102). Nevertheless, despite these vario
statements of Banning to Iseman, contradicti
some of the statements appearing in his own r
canting affidavits and in his wife's affidavit, Ba
ning admitted to Iseman and other agents that h
was recanting, at least to some extent, his tri
testimony (see R. 203, 295).

On June 10, 1948, Iseman's affidavit furth

stated, Banning threatened to "make some more affidavits" if he, Iseman, would not do what he could to "get [Banning] into a Federal Pen" (R. 103). "If you get me into a Federal Pen," Banning stated, "we can keep Gordon in" (R. 104).

Iseman's affidavit was corroborated by affidavits of F.B.I. agents Willoughby (R. 105-113) and Zeimes (R. 113-115).

With reference to petitioner's claim that Banning was "rewarded" for his trial testimony by receiving certain favorable consideration from the Government (see pp. 15-16, *supra*), affidavits were filed by Harold D. Beaton (R. 116-119), a Special Attorney in the Department of Justice, and Thomas P. Thornton (R. 120-126), the Assistant United States Attorney who successfully prosecuted petitioner. Both Beaton and Thornton stated that the Presidential pardon granted Banning in connection with his 1941 conviction under the National Stolen Property Act was procured because subsequent events demonstrated that he was not and could not have been guilty of the particular offense of which he was convicted (R. 117-119, 123). Beaton also explained that the United States Attorney at Cleveland was authorized to dismiss the indictment there pending against Banning, Sidran, Graves, and one Petrelli because Banning, without whose testimony the possibility of a successful prosecution was remote, refused to testify against his co-defendants, and because, in addition, all the de-

fendants were either already under heavy sentences in penitentiaries or were awaiting sentence (R. 116-117). Thornton further explained that, following Banning's receipt of the above-mentioned Presidential pardon, and while he was awaiting sentence on his plea of guilty in the instant case, the Pinkerton Detective Agency indicated interest in employing Banning in an undercover capacity to assist it in investigating certain recent jewel thefts; that Banning expressed willingness to accept such employment; that, with the approval of the court, Banning was released on his personal bond for the purpose of accepting such employment; but that "[a]fter Banning's release as aforesaid, the Pinkerton Agency did not so employ him, with the result that Banning gained employment in private industry in Detroit" (R. 124). Thornton further stated that he never offered Banning, and that Banning never requested, any consideration for his testimony at petitioner's trial (R. 122).

In addition to the above-described affidavits offered in support of its motion in opposition to the motion for a new trial, the Government filed, in further support of its motion, and as "Exhibit 'M' " thereto, a document entitled "Appellee's Memorandum in Opposition to Motion to Suspend Appellate Proceedings and Remand Cause to the District Court, &c." (R. 127-169). This memorandum had previously been filed in the Court of Appeals while petitioner's appeal from his original

conviction was pending; it was submitted in opposition to a motion by petitioner to remand the cause to the District Court for the purpose of having that court entertain a proposed motion for a new trial, based upon the affidavits of Sidran and Graves, to which we have already referred (see pp. 16-18, *supra*). In this memorandum, *inter alia,* the Government pointed out that not only had petitioner himself not taken the stand to contradict Banning at the trial (R. 138-139), but that there were numerous persons referred to by Banning in his trial testimony whom petitioner could have called as witnesses, but did not, to contradict Banning's allegedly perjurious testimony (R. 139-144). Attached to this memorandum as exhibits were several affidavits which showed the falsity of Sidran's alleged alibi (see pp. 17-18, *supra*) offered by him to prove, in contradiction of Banning's trial testimony, that he could not have participated with Banning in either the Akron robbery of August 28, 1940, or the Ollendorff theft of September 13, 1940.[8] The Government's memorandum also showed the falsity of Graves' affidavit, in which he denied all association with Banning during the year 1940 (*supra,* p. 18), by pointing out that

[8] The affidavit of Maurice La Belle (R. 153-155) showed that the Great Lakes Cruise taken by Sidran and his wife took place between August 20 and August 27, 1940. Furthermore, Dr. Mellen, the physician to whom Sidran claimed to have taken his pregnant wife on September 13, 1940, stated in an affidavit (R. 155-156) that he last treated Mrs. Sidran in April 1940.

Graves had been positively identified at petitioner's trial as one of the participants with Banning in the Akron holdup of August 28, 1940 (R. 137-138).

4. After a motion to strike the Government's answer (R. 170-173) was overruled (R. 174), petitioner filed a reply (R. 174-180) which was supported by a further affidavit by Banning, his third (R. 181-190), and by an affidavit by the attorney Comb (R. 191-194), describing the circumstances under which he procured Banning's earlier affidavits, and denying the use of undue influence in their procurement.

In his third affidavit, dated August 23, 1948, after he had been committed on the Michigan sentence (see pp. 21-22, *supra*), Banning stated that he told the F.B.I. agents time and again, after making his original affidavits, that he had "lied at the Gordon trial" in implicating Gordon in any way in the Ollendorff theft, and accused the agents of omitting from their affidavits this admission on his part (R. 181-182). He further stated that many of Mr. Comb's visits to him in jail around the time of his making the original affidavits had nothing to do with the execution of these affidavits, but were devoted to the doing of sundry personal favors for him (R. 183-184). He also contradicted some of the statements made in the affidavits filed by agent Iseman and other agents (see pp. 22-25, *supra*), notably the state-

ments, attributed to him by the agents, that he feared mistreatment by fellow prisoners (R. 188-189), that he desired to get into a federal penitentiary (R. 189), and that he "felt sure" that petitioner "had fenced the [Ollendorff] merchandise" (R. 189-190). He further stated that, during the two-year period in which he was confined in Wayne County Jail in Detroit prior to petitioner's trial, "there were many things done for me which made me feel sure that if Meyer Gordon were convicted I would be set free" (R. 186). He was given certain privileged positions at the jail, such as elevator operator, storekeeper, and turnkey, he said, and on one occasion agent Johnson "bet me a $10.00 hat that if Gordon were convicted I would be freed" (R. 186-187). His trial testimony that he "hadn't even been thinking about getting out of jail" was therefore untrue, he added (R. 187).

5. On December 7, 1948, a hearing on the motion for a new trial, consisting of argument by counsel, was held (R. 197-244). At this hearing, there was filed, for the first time, an affidavit by petitioner (R. 195-196), dated October 21, 1948, denying that he had ever received the proceeds of the Ollendorff theft, and stating that he had never met Banning, Graves, or Sidran "at the Southmoor Hotel in Chicago." On December 23, 1948, District Judge Picard—the same judge who presided at petitioner's trial—denied the motion (R. 245).

On December 28, 1948, petitioner moved for an order vacating the order denying the motion for a new trial (R. 246-252), which was answered (R. 253-269) and, following a hearing (R. 270-304), was denied on January 4, 1949 (R. 304). While the cause was pending in the Court of Appeals, petitioner filed a motion to remand the cause to the District Court for reconsideration of the motion for a new trial, on the basis of newly discovered evidence (R. 310-320). The motion to remand was denied by the Court of Appeals (R. 345), which also affirmed the orders of the District Court (R. 332). The matters referred to in this paragraph will be discussed in the Argument, *infra,* pp. 43-48.

ARGUMENT

1. Petitioner contends (Pet. 3, 10-11, 29-33) that because Judge Picard, who sat both at petitioner's trial and in the proceedings on the motion for a new trial, remarked, in the course of the hearing on the motion for a new trial, that he "didn't necessarily believe Banning" at the trial (R. 226), the judge was under a duty to grant him a new trial. We think this contention is unsound.

It is evident that petitioner seeks to equate Judge Picard's remark that he "didn't necessarily believe Banning" at the trial to a statement that he *did not* believe Banning's trial testimony. Even on their face, however, the two statements are manifestly not equivalent. And examination of the context in which Judge Picard's remark was made dis-

closes that he had no intention of declaring his disbelief in Banning's trial testimony. The remark was made in the course of a colloquy with one of petitioner's attorneys at the hearing, who had argumentatively asked the judge, "* * * why should you believe Banning's testimony when given on the witness stand * * *, and disbelieve the recantation which has now been made?" Judge Picard's reply, now so strongly relied upon by petitioner, was obviously made for the purpose of informing counsel that he was assuming too much by his question, since he, the judge, had never *said* he believed Banning at the trial (see R. 226).

It is clear to us, as it was to the Court of Appeals (see R. 338-339), that Judge Picard eventually decided (not necessarily during the hearing, but at least some time prior to his decision denying the motion for a new trial) that Banning told the truth at the trial, and was lying in his recanting affidavits. If there could be any doubt as to the correctness of the Court of Appeals', and our, understanding that Judge Picard, in denying the motion for a new trial, disbelieved Banning's recantation of his trial testimony, that doubt is removed by the judge's explicit statement,—"* * * I don't believe Banning today,"—made during the hearing on the motion to vacate the order denying the motion for a new trial (R. 277). For the reasons presently to be stated, there was ample basis for Judge Picard's disbelief of Banning's recanting affidavits and for

crediting his testimony at the trial, and, hence, for his denial of the motion for a new trial.

A motion for a new trial on the ground of newly discovered evidence is addressed to the informed discretion of the trial judge; absent a showing of abuse of that discretion, there is no occasion for appellate interference with his decision. *United States* v. *Johnson,* 327 U.S. 106; *Gage* v. *United States,* 167 F. 2d 122, 125 (C.A. 9); *Blodgett* v. *United States,* 161 F. 2d 47, 54-56 (C.A. 8). This is so because it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances." *United States* v. *Johnson, supra,* 327 U.S. at 111.[9]

The fact that a prosecution witness recants his trial testimony following the conviction of a defendant against whom he testified does not, *ipso facto,* necessitate the granting of a new trial, and this is so, even though the recanting witness'

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[9] Petitioner strongly relies upon *Griffin* v. *United States,* 336 U. S. 704 (Pet. 29-31), but that case, we think, is inapposite. The *Griffin* case did not involve a recantation by a government witness. There was no conflict about the truth of the new evidence there relied on for a new trial, *viz.,* the presence of the open knife in the deceased's pocket, because "the Government conceded that it knew of this circumstance at the time of the trial" (336 U. S. at 707). Here, on the other hand, the truthfulness of Banning's recantation was sharply controverted.

testimony was highly material. *Larrison* v. *United States,* 24 F. 2d 82 (C.A. 7); *People* v. *Shilitano,* 218 N.Y. 161. The *Larrison* case, *supra,* which is cited by the court below (R. 338), is strikingly similar on its facts to the case at bar. There the Seventh Circuit held that when a trial judge is confronted with a recantation by an important Government witness, he should, before granting a motion for a new trial on the basis of the recantation, be "reasonably well satisfied," first, that the recanting witness' trial testimony was in fact false; second, that "without it the jury *might* have reached a different conclusion"; and, third, that "the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial" (24 F. 2d at 87-88). Under this rule, the fact that the trial judge may doubt, in consequence of the recantation, that a new jury would give credence to the witness' original testimony, does not in itself require him to grant a new trial.[10] He must himself inquire into the question of whether it was at the trial or in the recantation that the witness spoke the truth. He is not "at liberty to shift upon the shoulders of another jury his own responsibility" in this re-

[10] Hence, we think, petitioner mistakenly relies (Pet. 3, 10, 31) on Judge Picard's statement during the hearing on the motion for a new trial that "[t]here couldn't be a jury in the world found now to believe Banning" (R. 231).

gard (Cardozo, J., concurring in *People* v. *Shilitano, supra,* 218 N.Y. at 180).[11]

Judge Picard, we submit, was justified in refusing credence to Banning's recanting affidavits, and, accordingly, in denying the motion for a new trial, in the light of the following facts:[12]

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[11] In the *Shilitano* case, involving a motion for a new trial following a conviction of *first-degree murder,* Judge Cardozo said (218 N.Y. at 180-181):

"Three witnesses for the prosecution have stated under oath to the trial judge that their testimony upon the trial was false. It became his duty to say whether they were conscience-stricken penitents, or criminal conspirators to defeat the ends of justice. He has held them to be conspirators. Unless we can say that he was wrong, * * * we have no right to reverse his order. But I do not see how we can say that he was wrong. I do not understand that even the judges who think this judgment should be reversed, assert that he was wrong. Their view is that with such a conflict of oaths, he should have abandoned the search for truth, and turned it over to a jury. That would have been an easy avenue of escape from a solemn responsibility, but I cannot satisfy myself that along that avenue lay the path of duty. I think it was the duty of the trial judge to try the facts, and determine as best he could where the likelihood of truth lay. * * * I do not mean that to justify a new trial, he must have been convinced—firmly or with a sense of certainty convinced—that the first story of the witnesses was false and that their new story was true. He might act upon a reasonable probability. But if, on the contrary, he was *convinced* that the second tale was false, that a criminal league had been formed to set at naught the verdict of the jury and the judgment of the court, his duty was clearly marked [citing cases]. He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumph. He was charged with a responsibility to seek the truth himself."

[12] In the list of considerations which follow we do not purport to exhaust the factors which may have weighed in Judge Picard's decision to deny a new trial. Judge Picard wrote no opinion from which might be ascertained the relative weight given by him to the various considerations to which we advert. But he "read every word of every affidavit, and all the answers, and everything that has been submitted in this case" (R. 199),

(1) Banning's testimony at the trial was corroborated in several vital respects. Though no witness other than Banning specifically identified petitioner as the receiver of the stolen jewels in the Ollendorff and the many other thefts recounted by Banning, the latter's testimony linking petitioner to his criminal enterprises *generally* was corroborated by at least five witnesses (four physicians and an automobile salesman). See pp. 7-9, *supra*.

(2) If Banning was lying at the trial in naming petitioner as his fence in his thefts generally and the Ollendorff theft in particular, no one knew that fact better than petitioner. Yet, (a) he did not take the witness stand to contradict Banning; (b) he did not call Banning's wife as a witness on his behalf, though she, according to the allegations of her affidavit filed in support of the motion for a new trial, would have been a vital witness, whose testimony, if believed, would have shown Banning to be a perjurer, and F.B.I. agent Johnson, a suborner of his perjury (see pp. 10-11, 13-14, *supra*); and (c) there were numerous other persons referred to by Banning in his trial testimony, not shown by petitioner to have been unavailable to him as witnesses at the trial, who could have contradicted pertinent portions of Banning's testimony

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and gave the case his most conscientious consideration (see, especially, R. 215). So intense, indeed, was his desire to learn whether there had "been a mistake made" in petitioner's conviction (R. 215), that it is now claimed by petitioner that he erred in going too far in his search for the truth (see pp. 43-45, *infra*).

if he was not telling the truth (*supra,* p. 27). As we have indicated, petitioner's only defense at the trial consisted of Banning's alleged prior inconsistent statements (in the letter to his wife, written June 27, 1943), in respect of which he was thoroughly cross-examined, and which he evidently explained to the jury's satisfaction (*supra,* pp. 9-10).

(3) The circumstances under which Banning executed his recanting affidavits rendered them suspect. They were executed at the instance of an attorney whom petitioner's wife had employed to visit him (Banning) in jail,[13] and who admittedly (see R. 183-184, 192) performed numerous favors of a personal nature for Banning at about the time he was procuring the latter's recanting affidavits (*supra,* pp. 20-21, 28). The first recanting affidavit, moreover (March 30, 1948), was made but a little over a month after Banning had assured the F.B.I. agents, on February 24, 1948, that it would be useless for any one to try to induce him to alter his trial testimony, because it was the truth (*supra,* p. 21).

(4) The credibility of Banning's recanting affidavits is further impeached by his admissions to the F.B.I. agents, who questioned him about various of the statements made in them, that some of the statements were either false or misleading (*supra,* pp. 23-24); by his admissions to the agents that he was motivated in making the recantations

[13] Cf. *Larrison* v. *United States, supra,* 24 F. 2d at 89.

by considerations other than vindication of the truth (*supra,* p. 23);[14] and by his threat of June 10, 1948, to "make some more affidavits" if the agents did not do what they could to get him out of Michigan custody and into federal custody (*supra,* p. 25).

(5) In none of Banning's affidavits did he repudiate his trial testimony identifying petitioner as his fence in connection with his numerous thefts other than the Ollendorff theft (*supra,* pp. 5-7, 11-13, 28-29). In fact, petitioner himself, in his eleventh-hour affidavit (R. 195-196; and see p. 29, *supra*) contradicting Banning's trial testimony naming him as the fence in the Ollendorff theft, refrained from contradicting Banning's testimony identifying him as the fence in the long list of other thefts recounted by Banning. And it was not until the prosecuting attorney and the court had "raised a question concerning the absence of any affidavit" by petitioner himself in support of his motion for a new trial that petitioner made even this limited denial of Banning's trial testimony (R. 196; see R. 229-230).

(6) The insinuation in Banning's first affidavit that the Government purposely refrained from trying Sidran and Graves with petitioner because of his, Banning's, alleged refusal to testify against

[14] Banning denied, however, in his third affidavit, that he had made such admissions to the agents (see pp. 28-29, *supra*).

petitioner if he had to testify against Sidran and Graves at the same time (*supra,* pp. 12-13) was squarely refuted by the fact that the Government did all in its power to procure those defendants' presence at the trial under a writ of habeas corpus *ad prosequendum,* which the Ohio state authorities refused to honor (see R. 158-159; Orig. R. 478). Furthermore, agent Johnson denied that Banning ever told him he would not testify at the trial if Sidran and Graves were present (*supra,* p. 19).

(7) The affidavits of Sidran and Graves, in which they denied complicity in the Ollendorff and certain other thefts in which Banning had implicated them at the trial (*supra,* pp. 17-18), and which, if true, were further evidence of Banning's trial perjury, were shown to be false (*supra,* pp. 27-28). Indeed, even the *recanting affidavits* of Banning contradicted them (notes 5 and 6, *supra,* p. 18). Obviously, a demonstrably false affidavit designed to establish the truth of a claim is worse than worthless for this purpose; it tends positively to cast doubt on the proposition in support of which it is offered.

(8) In discounting the affidavit of Zussman (*supra,* pp. 14-15), an admitted accomplice of Banning in the Ollendorff theft, Judge Picard may have been influenced by the following considerations: Zussman admitted in his affidavit having "had nothing to do with the disposal of the merchandise," and, according to Banning's trial testimony, Zuss-

man remained in the hotel lobby while the other thieves went to Banning's room to display the stolen jewels to petitioner (*supra,* p. 5), so that he, Zussman, could have had no personal knowledge of the identity of the fence in that case. Consequently, the only relevant statement in his affidavit was his "understanding from the conversation" of the other thieves that "they expected to dispose of the merchandise to a person named Abe Ginsberg," not petitioner, of whom Zussman had allegedly never heard until the return of the indictment. But, assuming that Zussman was telling the truth in this respect, Judge Picard may well have concluded that the other thieves had deliberately concealed from Zussman the identity of the true fence. This theory finds full support in Banning's trial testimony, which Judge Picard determined to be truthful. For Banning testified that he, Sidran, and Graves, following a discussion among themselves, decided that they "did not want [Zussman] to go up to the room because he did not know Mr. Gordon" (Orig. R. 91). On the other hand, Judge Picard may simply have disbelieved Zussman's affidavit, in view of the fact that it was made by a convicted felon and narcotic addict (fn. 4, *supra,* p. 14), at the instance of an attorney in petitioner's employ (see R. 26), a full two years after the allegedly wrongful conviction of petitioner, which Zussman claimed made him "very unhappy" at the time (R. 25).

2. At one point during his testimony on the original trial, Banning testified that he had not "been promised anything" and that he had not "even been thinking about it [*i.e.*, about the possibility of receiving lenient treatment because of his testifying for the Government]" (Orig. R. 181). Petitioner states that this testimony of Banning's was false (Pet. 16), that the Government was guilty of misconduct in permitting him so to testify and supporting his testimony in summation to the jury while knowing that the testimony was false (Pet. 13), and that, for these reasons, a new trial is required (Pet. 10). But while, in his third recanting affidavit (*supra,* p. 29), Banning did state that he swore falsely in testifying that he "hadn't even been thinking about getting out of jail", he has never retracted his trial testimony that he had been promised nothing in return for testifying. On the contrary, he admits even now that the Government never promised him anything for testifying (*supra,* p. 13). Consequently, there clearly was nothing improper in the prosecuting attorney stating to the jury, in his summation, that Banning had "been promised nothing" (see R. 38-39).

There remains, of course, the falsity of Banning's statement that he had not "even been thinking about" the possibility of leniency. See *supra.* But the truth or falsity of that testimony was plainly placed in issue and submitted to the jury

at the original trial,[15] and it is highly unrealistic to suppose that the jury's verdict was premised on its belief of this testimony. The trial judge, during the hearing on the motion for new trial, pointed out that he was "not naive enough to believe that they [the Government] were going to throw this fellow into a dungeon" (R. 236). And it is not too much to say that it is common knowledge that all defendants who plead guilty and "cooperate" with the Government by testifying against their accomplices hope for more lenient treatment than they could otherwise expect.

The assumption that the jury did not have this knowledge is a slim reed upon which to rest a motion for a new trial. The trial judge specifically cautioned the jury, in his charge, that Banning "is admittedly a rather bad character", that his testimony should be "received by you with caution, that you should scrutinize his testimony very carefully." (Orig. R. 436). In that connection he informed the jury that "the Court expects you to use the experience of years and common sense in this case", and to inquire into the motives behind Banning's testimony (*ibid*). "You know", he said (Orig. R. 437) "whether they have any axe to grind."

Apart from truthfully affirming Banning's statement that he had been made no promises, the

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[15] See the examination of Banning quoted at Pet. 18; Gordon's counsel's summation quoted at R. 38, footnote; and the prosecutor's remarks, in summation, quoted at R. 38-39, footnote.

Government at no point supported his testimony as to his expectations. In his summation, the assistant United States Attorney simply stated the fact that Banning was still subject to punishment for this and other crimes; indeed, he went beyond this to state that "there is no question in my mind what steps should be taken to correct [Banning's] improper sentence [with respect to his conviction on a charge of which he was plainly innocent]." R. 39, footnote. Even if the prosecutor had reason to believe that Banning would be accorded leniency in return for his testimony, it was not incumbent upon him to volunteer his predictions since defense counsel had fully called the attention of the jury to Banning's possible motivations (R. 38, footnote), as did the trial judge subsequently in his charge (*supra,* p. 41).

Finally, while the Government undoubtedly treated Banning very leniently in consenting to his release on bond, notwithstanding his plea of guilty and his admission at the trial of numerous armed jewel thefts and robberies, in order that he might secure employment with the Pinkerton Detective Agency (which, for reasons undisclosed by the record, never materialized),[16]—see p. 26, *supra*—such leniency certainly does not prove the claim it is invoked primarily to substantiate.

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[16] For the circumstances attending Banning's pardon for the Weiss robbery, and the dismissal of the Cleveland indictment against him and others, see pp. 25-26, *supra.*

viz, that Banning perjured himself at the trial in *implicating petitioner as his fence.*[17]

3. Petitioner contends that Judge Picard committed reversible error in privately interviewing Sidran in the state penitentiary at Columbus, Ohio, and thereafter extrajudicially consulting with F.B.I. agents in an effort to verify the truth of what Sidran told him (Pet. 7, 11-13, 21-24).

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[17] It is true that petitioner stated in his third recanting affidavit (*supra,* p. 29) that F.B.I. agent Johnson once "bet me a $10.00 hat that if Gordon were convicted I would be freed" (R. 186-187); that, if true, such a "bet" by Johnson, to quote the Court of Appeals, "would certainly seem to be an encouragement to Banning that Gordon's conviction would result in his liberation" (R. 337); and that, so far as the record indicates, this allegation of Banning's has not been contradicted.

However, in a "Memorandum of Authorities in Support of Government's Answer to Defendant's Motion and Amended Motion for New Trial," filed in the District Court on December 14, 1948, but not included in the printed record, the Government stated: "* * * on August 23, 1948, Banning executed a new affidavit, labeled Exhibit X [his third recanting affidavit; see R. 181-190], wherein he deposed that these FBI Agents [Iseman, Willoughby, and Zeimes; see R. 93-115, and *supra,* pp. 20-25] had lied in their affidavits. In addition, he sets forth a re-hash of allegations in previous affidavits. *The Government has secured additional affidavits from persons named in Banning's latest affidavit and we are prepared to file these affidavits if the Court deems it necessary.* However, it is readily apparent that this practice of filing affidavits and counter-affidavits wherein one deponent alleges that the other deponent has lied in prior affidavits, can go on indefinitely" [italics added]. Among the "additional affidavits" referred to was one by agent Johnson, executed November 9, 1948, containing, *inter alia,* a categorical denial that he had ever made any such wager with Banning as the latter claimed. However, neither this affidavit nor any of the others referred to in the Government's memorandum was filed, evidently because the court was satisfied that the further accumulation of affidavits and counter-affidavits in the record would serve no useful purpose.

The opinion of the Court of Appeals fully reviews the facts on which this contention is based (R. 339-342) and they need not be repeated here. The Court of Appeals concluded that "In all that he did in this case, the trial judge was actuated by the highest motives of justice" [18] and that "from everything before us in this case, we can conceive of no disadvantage to Gordon resulting from the action of the trial judge" (R. 342). We submit that these conclusions are correct, and that consequently there was no prejudicial error.

The following points should be emphasized in appraising the present contention: First, Judge Picard's interview with Sidran and his subsequent consultation with the F.B.I. agents were the result of a request on the part of petitioner's daughter that he make a personal investigation into certain aspects of the case (R. 273-275, 339-340). Secondly, Judge Picard learned nothing from his extrajudicial investigations that was not already in the record in the case (R. 262-263, 264-265, 340-341).[19] And thirdly, any objection petitioner may have had to Judge Picard's investigations was waived. Pe-

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[18] Counsel for petitioner, moreover, conceded that they "don't question the good motives of the court in going to see Sidran" (R. 281).

[19] Sidran told Judge Picard exactly what he had stated in his affidavit (*supra*, pp.17-18) already on file in support of the motion for a new trial (R. 221), *viz.*, that Banning lied at the trial in placing him at the scenes of two 1940 robberies because he, Sidran, had an alibi for the crucial dates. Similarly, the data supplied the judge by the F.B.I., at his request, impeaching Sidran's veracity were also already contained in record affidavits (*supra*, p. 27; R. 262-263, 264-265).

titioner's counsel learned of the judge's extrajudicial investigations at the hearing on the motion for a new trial, held December 7, 1948 (R. 220 *et seq.*). They made no objection to the judge's activities until three weeks later (December 28, 1948, see R. 246-248), which was *after Judge Picard had denied the motion for a new trial on December 23, 1948* (R. 245). Petitioner first registered his objection in a motion to vacate the order denying the motion for a new trial (R. 246-248). Plainly, if petitioner felt that Judge Picard's extrajudicial inquiries in any way prejudiced him, he was bound, in fairness to the court, to make known his objection immediately, before the judge acted on his motion for a new trial. See colloquy at R. 297. He was not justified in waiting to see how the judge acted on his motion, and then for the first time objecting upon learning that the decision was adverse to him.

4. While his appeal was pending in the Court of Appeals, petitioner filed a motion to remand the cause to the District Court for reconsideration of its order denying the motion for a new trial (R. 310-320). The motion to remand was based on the ground that petitioner, during the pendency of the appeal, had discovered new evidence that Banning was "rewarded" for his trial testimony against petitioner, *viz.*, the dismissal, on June 28, 1947, of a Nebraska state robbery information against Banning at the "request of [the]

United States District Attorney, Detroit, Michigan" (R. 310, 317, 319-320). The Government's answer to the motion to remand (R. 320-322) was supported by an affidavit of Mr. Thornton (R. 322-327), the Assistant United States Attorney at Detroit who prosecuted petitioner in the instant case. Thornton stated in this affidavit that at the time consideration was being given to the Pinkerton Detective Agency's request to engage Banning as an undercover agent (see p. 26, *supra*), he, Thornton, realized that Banning could not be used in this capacity in view of the pendency of the state robbery charges against him in Nebraska; that he accordingly communicated with the Nebraska prosecuting attorney to inquire as to the status of the pending charges; that the Nebraska prosecutor advised him that he was planning to dismiss these charges because he doubted the possibility of a conviction in view of the acquittal of a codefendant of Banning; that he, Thornton, felt that, "in view of the active cooperation given to the Government by Banning together with the fact that he could still be useful to the law enforcement agencies and because of the weakness of the criminal case in Nebraska * * * and the further fact that [Banning] had served six years on the sentence for which he was pardoned," the ends of justice would best be served if the Nebraska charges against Banning were dismissed; and that he accordingly communicated to the Nebraska pros-

ecuting attorney "his appreciation for any favorable consideration" in regard to dismissal of the Nebraska prosecution (R. 326-327). Thornton emphasized, however, that "at no time was Banning promised the dismissal of the information against him in Nebraska as a reward for his testimony against" petitioner (R. 327). Thornton's affidavit was corroborated by an affidavit of the Nebraska prosecuting attorney (R. 328-329), who emphasized that the dismissal of the state charges against Banning was due "both [to] the weakness of the state case and the request [by Thornton] for dismissal," and that, had it not been for the former consideration, the case would not have been dismissed irrespective of any such request (R. 329).

Petitioner's contention (Pet. 8-9, 13, 37-38) that the Court of Appeals erred in denying the motion to remand (R. 345) is, we submit, without merit.[20] Mr. Thornton's intercession with the Nebraska authorities on Banning's behalf was merely cumulative evidence of the favorable treatment which Banning admittedly received following his cooperation with the Government in testifying against petitioner. For the reasons previously stated (see pp. 41-43, *supra*), that favorable consideration does not establish that Banning committed perjury when he implicated petitioner at the trial. The important fact is that Banning was not *promised*

[20] Petitioner, moreover, virtually concedes that this action by the Court of Appeals is not a valid ground for certiorari (Pet. 38).

anything as a reward for his cooperation, as attested by Thornton in his affidavit (*supra*). The Court of Appeals, therefore, correctly determined that the new evidence relied on in the motion to remand was insufficient to warrant a different disposition by the District Court of the motion for a new trial, and therefore appropriately exercised its discretion in denying the motion to remand.

CONCLUSION

The petition for a writ of certiorari, in our judgment, presents no question requiring further review by this Court, and should therefore be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 548

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Mindful that it is not the office of a reply brief to recanvass the merits of the case at large, we confine this brief to a short but, we think, most important response to the brief of the Government.

I.

The Government's brief undertakes to assay the facts. But the Trial Judge's declaration as to the facts supports petitioner, not the Government.

The Government's brief is almost entirely devoted to arguing that the Trial Judge would have been justified

in disbelieving Banning's recantation and petitioner's affidavit asserting his innocence.

But the Trial Court actually declared that

(1) Credence in Banning's testimony was essential to conviction,

(2) No jury would, in the light of the newly discovered evidence, now believe Banning, and

(3) He, the Trial Judge, did not necessarily believe his trial testimony, and had never said anywhere that he had done so.

This is *not* a case where the petitioner is dissatisfied with the Trial Judge's resolution of questions of immediate fact or mediate factual inference. It *is* a case in which petitioner not only *accepts the Trial Judge's declarations as to the facts,* but relies upon those declarations as entitling him to a new trial.

The Government is quite correct when it says, as this Court has so often said, that weighing the facts is the function of the Trial Judge, not of the Circuit Court or of this Court. (*U. S.* v. *Johnson,* 327 U. S. 106). But in this case that rule aids the petitioner, not the Government.

II.

This case propounds a basic question as to the proper canon of judicial discretion on motions for new trial on the ground of newly discovered evidence.

The Government's own cases (pages 32-33, Government's brief), as well as those cited by petitioner (pages 30-32, petitioner's brief), show plainly that there is a contrariety of opinion among the lower courts as to

whether the criterion on a motion for new trial on the ground of newly discovered evidence is

Does the *Trial Judge* believe the newly discovered evidence?

or

Does the Trial Judge believe that a *jury* would believe that evidence?

Since, as the Government contends, a Trial Judge's decision is final where the evidence is fairly conflicting (*and the hearing is otherwise fair*), it is most important that this Court guide Trial Judges, not by reweighing the facts in particular cases, but by an authoritative pronouncement as to the proper *critique* for the Trial Judge: Is he, as an individual, to take the responsibility for weighing the newly discovered evidence, or is he to decide whether a jury should ponder the new proofs?[1]

The presence of this question in the record, with diversity of opinion reflected in the lower court's decisions cited in petitioner's brief, (pages 32-33) should, we submit, elicit *certiorari*.

III.

This is not a case of mere recantation. It is a case where independent evidence demonstrates perjury at the trial on the part of the recanting witness.

The record is indeed replete with Banning's recantations. But it is replete with more than that.

[1] To our knowledge, this Court has never declared what the true test should be where recantations are involved, or where, as in this case, the evidence consists of recantations plus substantial and uncontradicted independent evidence showing the witness' perjury. Neither *U. S.* v. *Johnson* 327 U. S. 106 nor *Griffin* v. *U. S.* 336 U. S. 704 involved recantation evidence.

In petitioner's original brief, he demonstrated that Banning testified, not only that he had not been promised, but that he was not *expecting* reward.

It now appears, by evidence entirely independent of Banning's recantations, and which did not exist when Banning implicated petitioner on the latter's trial, that Banning has been *lavishly* rewarded.

The test is not, as the Government suggests, (page 47, Government's brief) whether Banning had been *promised* any reward for convicting petitioner. It is whether Banning *expected* anything, whether it had been promised or not.

The Government's assumption that as long as they did not expressly promise him immunity, there is an end to the matter, is excessively naive, for the important thing and the proper test is not what was said by the prosecutor, but what was in the mind of the witness. See *Farkas* v. *United States,* 2 F. (2d) 644, (CCA 6); *Sandroff* v. *United States,* 158 F. (2d) 623 (CCA 6); *Alford* v. *United States,* 282 U. S. 687, 692-93, 51 S. Ct. 218, 75 L. Ed. 624; *Stevens* v. *People,* 215 Ill. 593, 601.

The Government let Banning swear that he had no hope of reward. Then it rewarded him.[2]

We say, *and the Trial Judge found and declared* (Tr. 235-236) that the Government intended to reward Banning and that Banning expected such a reward.[3]

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[2] The Circuit Court of Appeals said (Tr. 337), "And he (Banning) certainly did receive advantageous consideration from the Government, through obtaining a pardon for the Weiss crime (which he did not commit), and by being allowed to go free on bond after he had pleaded guilty to the Ollendorf robbery, as well as being given help by Government officials in securing employment, and in other ways."

[3] Petitioner's evidence concerning (a) The bet between Banning and Agent Johnson and (b) the thrice repeated offer by FBI agents to "do Banning a lot of good and not to indict his wife at Fort Wayne (both occurring before the trial) was not disputed by any evidence on the record. The Government's statement (p. 43) that they had evidence which they did not file—is clearly improper.

The Government, now tacitly admitting what the Circuit Court of Appeals found to be true (Tr. 337) that Banning, indeed, received "advantageous consideration" from the Government, now argues (page 41, Government's brief) that the jury *probably did not believe Banning's disclaimer* of personal motivation anyway and presumably was not swayed by the prosecutor's argument to the effect that he, Banning, "Faced 20 years in this case and 10 years at Cleveland."

How can anyone speculate on that, especially where Banning's credibility was of such vital moment at the trial? Indeed, we are constrained to ask, should 20 years of a man's life depend on the thread of such speculation?

The incrimination of petitioner in the instant crime required belief of Banning's trial testimony. The Trial Judge so says. The Court of Appeals so says. Banning is now a proved perjurer. The Trial Judge says no jury would now believe him. The Trial Judge does not believe him.

On these demonstrations and findings petitioner is entitled to a new trial.

IV.

The Trial Judge's excursion to the penitentiary denied petitioner due process of law.

We do not repeat our demonstration that the Trial Judge's secret trip to the penitentiary was error. The Government does not appear to challange that demonstration.

But, says the Government, petitioner was not prejudiced by this trip.

There are two replies to this contention of the Government's:

First: The fact that one cannot usually tell when such an excursion as that involved in this case prejudices, and when it does not prejudice, a defendant is the very reason that the law forbids it. If one could know that a prisoner would not be prejudiced by such a secret inquisition on the part of a judge, such inquisitions should not be forbidden —they should be encouraged.

Second: We can be as sure as we are likely to in any case that petitioner *was* prejudiced. If the Trial Judge had not had doubts, misgivings and uncertainties as to the facts in this case, he would not have made the trip. *But the defendant is entitled to the doubts, misgivings and uncertainties of the trier of his facts.* And he is entitled to the Trial Judge's decision on the facts free from impressions, conscious or latent, deliberately engendered, or at least invited, by excursions such as that undertaken by the Trial Judge in this case.

This Court places great confidence in juries, administrative boards, and Trial Judges as triers of questions of fact. *Therefore it is of fundamental importance that the modes and methods of trying the facts be as pure and untainted as due process of law can make them.*

The Government suggests that petitioner waived his objection to the Trial Judge's extra-judicial excursion by not insisting that the Judge disqualify himself before he had announced his decision. But the Government simultaneously argues that the petitioner had no ground of objection until prejudice should appear. If, as the Government says, prejudice must appear before the petitioner has a basis of objection, it is clear that he has no right that he may waive until the Court has decided the motion.

There is a more forcible answer to this suggestion:

No defendant should be forced into the position of attacking the fairness of a judge before whom his case is under consideration.

Certainly he should not be compelled to make such an attack in advance of the decision.

In addition it is quite clear from the record that had the petitioner made such a motion it would have been summarily overruled for when petitioner's counsel protested the Court's suggestion that the Court go out and interview Banning and when counsel suggested that Banning should be subpoenaed to appear in open court the Court's reply was,

> "Wait a minute, that would be the most unheard of thing I ever encountered." (Tr. 244)

The Government has further asserted that the petitioner's daughter instigated the trip to see Sidran. This is expressly negatived in the record.[4]

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[4] The transcript discloses the following colloquy: (Tr. 275)
"Mr. Finn: May I ask you one thing, your Honor, did she request you to go down to Columbus?
The Court: No.
Mr. Finn: To meet Sidran?
The Court: But she did request that I get in touch with the FBI and look into all the affidavits."

V.

In view of the totality of the facts, the Court of Appeals should have remanded the case for the consideration of the evidence of the favors shown Banning in Nebraska.

Petitioner's counsel realize that if there were no question in this case except that raised by the refusal of the Court of Appeals to remand this case for evidence discovered after petitioner's appeal had been perfected, this Court would probably not grant *certiorari*. But this is a case in which petitioner's conviction depended on Banning's testimony, where a vital issue was whether Banning was disinterested, where the Trial Judge has already said that no jury would believe Banning, where the Trial Judge has made an unconstitutional investigation of the facts, and where, finally, petitioner tenders even further irrefutable evidence of Banning's perjury in the matter of his disclaimer of motive for testifying against petitioner.

The total complex of facts in this case demonstrates a denial of due process of such gravity as should elicit *certiorari* and result in reversal.

Respectfully submitted,

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Counsel for Petitioner.